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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 526

THE BALTIMORE AND OHIO RAILROAD COMPANY AND WESTERN MARYLAND RAILWAY COMPANY, PETITIONERS,

vs.

A. SPATES BRADY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 25, 1932

CERTIORARI GRANTED JANUARY 9, 1933

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(37,223)

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF WEST VIRGINIA

Law. No. 351

A. Spate Brady, Plaintiff,

vs.

The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation, Defendants

Note by District Clerk.—Title of Court and style of case are omitted from balance of transcript of record.

Petition—Filed Feb. 6, 1930

Plaintiff, A. Spates Brady, for cause of action against the defendants The Baltimore and Ohio Railroad Company, a corporation, and Western Maryland Railway Company, a corporation, says:

1. Plaintiff is a citizen of the United States and the state of West Virginia, and resides and has his principal place of business at Elkins in the Northern District of said state.

[fol. 2] 2. Each of the defendant railway companies above named is a common carrier engaged in interstate commerce, maintaining offices and owning and operating railroads, the lines of which run through the Northern District of West Virginia, and each of the said defendant carriers is subject to the Act to Regulate Commerce, approved February 4, 1887, and the several acts amendatory thereof and supplemental thereto. Each of the defendants is now and during the period from October 14, 1922, to April 1, 1923, was engaged in the transportation of coal from mines on its lines in West Virginia to interstate destinations on its lines and the lines of numerous connecting railroads.

3. During the period above referred to, October 14, 1922, to April 1, 1923, plaintiff operated a coal mine located on

what is known as the Coalton Branch of the said defendant Baltimore and Ohio Railroad. Plaintiff's mine was intermediate to two mines of the West Virginia Coal & Coke Company, a competitor of plaintiff hereinafter referred to as the Coal Company, located at the end of the said branch, and between the said two mines and a third mine of the Coal Company located on the said branch. Plaintiff's mine was also adjacent to a fourth mine of the Coal Company located on what is known as the Norton branch of the Baltimore and Ohio Railroad.

4. Sometime prior to October 14, 1922, the defendant companies and the Coal and Coke Railway Company (owned and operated by defendant The Baltimore and Ohio Railroad Company) entered into an agreement whereby the said defendant Western Maryland Railway was granted trackage rights over the Coalton and Norton branches of the Baltimore and Ohio Railroad to reach and serve the mines of the Coal Company located on the said branches. The said agreement was in effect until April 1, 1923, and the trackage rights granted thereby were exercised throughout the period between the said dates. Pursuant to said agreement and in compliance with the said Act to Regulate Commerce, the said defendant Western Maryland Railway published and had in effect during the said period schedules naming rates for the transportation [fol. 3] of coal from the aforesaid mines of the Coal Company to interstate points on its lines and the lines of numerous connecting railroads.

5. The defendant railways each established and had in force throughout the period aforesaid rules and regulations governing the rating of coal mines, and the distribution of coal cars among the mines, on their respective lines. The period hereinbefore referred to was a period of coal-car shortage on the lines of the defendant railways. The rules and regulations aforesaid and certain rulings and decisions of the Interstate Commerce Commission required that, during such periods of coal-car shortage, the cars available for coal loading should be distributed pro rata among the mines in accordance with their ratings or their orders if less than their ratings. They also provided and permitted the operator of any mine

reached by two railroads to order 100 per cent or less of its rating from either of the said railroads, or to divide the orders between the two railroads in any way which the judgment of the operator dictated, provided the combined orders did not exceed 100 per cent of the rating of the mine; and the mine was entitled to receive its pro rata share of the available cars on the basis of such orders and to ship the coal loaded therein via the railroad which furnished the cars.

6. As a result of the trackage agreement and rate schedules hereinbefore referred to, the mines of the Coal Company acquired the status of mines located on and reached by two railroads, to-wit, the said defendant Baltimore and Ohio Railroad and the said defendant Western Maryland Railway, with the right to order and receive cars for coal loading from, and to ship coal via, either or both of the said railroads on the basis of such divisions of 100 per cent of the mine ratings as the judgment of the Coal Company dictated, and the Coal Company exercised this right during the period aforesaid.

The said trackage agreement and the said rate schedules of the Western Maryland Railway did not name plaintiff's mine, and plaintiff was denied the right to order and receive cars for coal loading from, and to ship coal via, either or both the said railroads as his judgment dictated during the said period.

[fol. 4] 7. Prior to and during the said period, plaintiff repeatedly requested the said defendant railways, and each of them, to accord his mine the status of one located on both the said railways with the right, subject to the applicable rules and regulations, to order and receive cars for coal loading from, and to ship coal via, either or both the said railways as his judgment dictated, but his said requests were denied.

Throughout the said period plaintiff filed written orders for cars with the said defendant Western Maryland Railway, but the said railway, although it daily honored the orders of the Coal Company for cars and daily placed cars for loading at the said mines, refused to honor plaintiff's orders for cars and with a single exception refused to place cars for loading at plaintiff's mine, whereupon

plaintiff filed orders for cars with, and received a reduced supply of cars from, the said Baltimore and Ohio Railroad.

8. Plaintiff further shows that the said discriminatory acts and practices of defendants in failing and refusing to accord his mine a status on both the said railways with the right, subject to the applicable rules, to order and receive cars for coal loading from, and to ship via, either or both the said railways as his judgment currently dictated, and the said discriminatory failure and refusal of the Western Maryland Railway to honor his orders for cars by placing cars for loading at plaintiff's mine, were unjust, unduly prejudicial and unlawful in violation of the said Act to Regulate Commerce and acts amendatory thereof and supplemental thereto.

9. Plaintiff further shows that, if he had been permitted to secure his allotment of cars from and to ship his coal via either or both the said defendant railways as his judgment dictated from day to day, he would have chosen the Western Maryland Railway and secured his entire quota of cars from that railway because it had a much better supply of cars available for distribution than had the Baltimore and Ohio Railroad; that if the Western Maryland Railway had honored his daily orders for cars, he would have shipped his entire output via the said railway; that his [fol. 5] orders and requisitions to the said railway entitled him to receive a total of 818.1 cars of an average marked capacity of 50 tons each; that he actually received a total of only 372.8 cars of such average marked capacity; that during the period involved, the railroads urged him to load all cars furnished as heavily as possible; that he loaded the cars he received to an average of 53.55 tons per 50-ton car and that he would have loaded the additional cars he should have received to the same average loading; that the public demand for coal at interstate markets reached by or via the Western Maryland Railway was such that he could have sold his entire output, including the additional output which he would have loaded in the additional cars to which he was entitled, at the same average prices at which he sold the coal actually produced; that but for the unlawful acts and practices of defendants he would have produced and sold the additional coal; that his loss of

profits on the additional coal he would have produced and sold, and his increased costs of mining and selling the coal actually produced and sold, aggregated the sum of $57,735.11, and that he is entitled to judgment against the said defendants for said sum, together with lawful interest which has accrued thereon since April 1, 1923.

10. In October, 1923, plaintiff caused to be filed with the Interstate Commerce Commisson a formal complaint, Docket No. 15270, against the above-named defendant railway companies, charging, among others, that the discriminatory acts and practices of the said defendant railways in failing and refusing to serve plaintiff's mine with cars, as hereinbefore described, were in violation of the said Act to Regulate Commerce and acts amendatory thereof and supplemental thereto, and praying an award of reparation for the damages which plaintiff sustained as a result of said unlawful acts and practices of the said defendant railways. Thereafter, the following, among other, proceedings were had in the said case, to wit:

(a) After due hearing and investigation, a Division of the Interstate Commerce Commission, to-wit, Division 5, on July 25, 1925, found and concluded that the said charges in plaintiff's complaint had not been sustained.

[fol. 6] (b) Thereafter, upon petition of plaintiff, the case was reopened for reconsideration by the entire membership of the Interstate Commerce Commission. In a report dated May 10, 1926, the entire membership of the said Commission, including Division 5 thereof, reversed the previous finding and conclusion of Division 5 aforesaid, and held, among others, that—

"Under the circumstances complainant (the said A. Spates Brady) should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads."

The Interstate Commerce Commission further found and concluded that the acts and practices of the defendant railways resulted in undue prejudice to plaintiff. The said

report of the said Commission is found in volume 112 of the Interstate Commerce Commission reports beginning at page 244, reference to which is hereby made, and a copy of which is hereto attached, marked Exhibit "A" and made a part hereof.

(c) Thereafter, upon petition of plaintiff, the said Commission set the case for further hearing with respect to the amount of the damages sustained by plaintiff as a result of the unlawful acts and practices of the said defendant railways. In its report on the said further hearing, the said Commission made and set out numerous computations which were the same as many of those which plaintiff presented at the said hearing and by which he arrived at the figure of $57,735.11 as representing the amount of his damages, and thereupon made the following findings on page 331 of its said report, to-wit:

"The excess mining costs, amounting to $9,238.14, plus the lost profits, amounting to $48,451.07, gives a total of $57,735.11, which complainant (plaintiff A. Spates Brady) claims is the amount of the damages which he sustained. [fol. 7] Defendants do not question the method or figures used by complainant (plaintiff) in this computation."

But on page 332 of its said report, the said Commission made the following, among other, findings, hereinafter collectively referred to as the mitigation of loss-setoff finding, to-wit:

"It is a familiar rule that a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss. United States vs. F. & G. Co., 236 U. S. 512; Warren vs. Wetmore, 105 U. S. 224; Western Real Estate, Trustees, vs. Hughes, 172 Fed. 206; Hall vs. Paine, 112 N. E. 153. That principle is applicable here. By reasonable action on his part in accepting defendant's 20-80 offer, complainant could have increased his production to the extent of 1,625 tons in October, 1,940 tons in November, 3,960 tons in December, 4,980 tons in January, 2,545 tons in February, and 1,485 tons in March. To this extent his damage was due to his own action and defendants can not reasonably be expected to compensate him therefor."

And on the same page, to-wit, page 332, of its said report, the said Commission made the following additional findings, hereinafter collectively referred to as the average loading finding, to-wit:

"Complainant also erred in computing the tonnage that he could have produced, if he had been allowed to avail himself of the Western Maryland's car supply, by using an average loading of 53.55 tons per car. Under the rules 50 tons is used in determining the daily car rating and is likewise used in the rules governing distribution to coal mines."

Thereupon, the said Commission made revised mathematical computations based upon the said mitigation of lost-setoff and average loading findings, and arrived at the sum of $12,838.31, as the amount of plaintiff's damages, and entered an order, dated February 28, 1929, directing the said defendant railways to pay unto plaintiff, on or before May 1, 1929, the sum of $12,838.31, with interest thereon at the rate of six per cent per annum from April 1, 1923, to-wit, $4,685.98, or a total sum of $17,524.29. The said report of the Commission is found in volume 152 of [fol. 8] the Interstate Commerce Commission's reports, beginning at page 327, to which reference is hereby made, and a copy of which said report is hereto attached, marked Exhibit B and made a part hereof. A copy of the said order of the Commission is hereto attached, marked Exhibit C and made a part hereof.

(d) Thereafter, various petitions and motions to reopen the case were filed with the Commission, and the Commission, by separate orders, denied the said petitions and motions, the last order being dated December 2, 1929.

(e) The defendant carriers, and each of them, have been duly served with a true copy of the said order of the Commission dated February 28, 1929, and although thereunto requested the defendants, and each of them, have failed and refused to observe the said order of the Commission dated February 28, 1929, and to make to plaintiff the payment therein required of them, and have failed, neglected and refused to pay said sum or any part thereof to plaintiff.

11. Plaintiff further shows that the said mitigation of loss-setoff and average loading findings made by the said Commission in its said report dated February 28, 1929, and

all findings and computations auxiliary thereof appearing in the said report, dated February 28, 1929, are beyond the power of the said Commission, are erroneous as a matter of law, and therefore null, void and of no legal effect.

On January 17, 1930, plaintiff caused to be filed in this Court a bill of complaint, Equity No. —, against the said Interstate Commerce Commission and the United States of America, in which bill of complaint it was alleged, among others, that the said mitigation of loss-setoff and average loading findings made by the said Commission in its said report of February 28, 1929, and all findings and computations auxiliary thereof appearing in the said report of February 28, 1929, are beyond the power of the said Commission, without warrant in law and null, void and of no legal effect; and praying (a) that the Judge of this Court call to his assistance two other judges, one of whom shall be [fol. 9] a Circuit Judge as directed by the Act of Congress known as the District Court Jurisdiction Act, approved October 22, 1913; (b) that this Court adjudge, order and decree that the said mitigation of loss-setoff and average loading findings and all the findings and computations auxiliary thereof contained in the said report of the Commission dated February 28, 1929, are null and void, and that the said findings be set aside and annulled; (c) that this Court issue an order directing the said Commission to reopen the proceeding in which the said report and order of February 28, 1929, was made, to reconsider the said mitigation of loss-setoff and average loading findings, and to make corrected findings and a supplemental order consistent with the order and decree of this Court, and (d) that this Court grant unto plaintiff such other and further relief as may be fit and proper.

12. Plaintiff further shows that he is entitled to recover judgment as and for damages from the defendant railways (a) the sum of $17,524.29, together with lawful interest thereon since May 1, 1929, in accordance with the said order of the Commission dated February 28, 1929, and (b) such additional sum as, when added to the said sum of $17,524.29 plus interest thereon since May 1, 1929, will make a total sum of $57,735.11 together with lawful interest on said total sum since April 1, 1923.

Wherefore, plaintiff brings this suit and prays judgment against defendants The Baltimore and Ohio Railroad Com-

pany and Western Maryland Railway Company in the total sum of $57,735.11 with lawful interest thereon from April 1, 1923.

Plaintiff further prays for his costs in this suit, including therein his reasonable attorneys' fees.

S. T. Spears, George T. Bell, Attorneys for Plaintiff.

Duly sworn to by Samuel T. Spears. Jurat omitted in printing.

[fol. 10] Note by District Clerk

Attached to the foregoing petition is a paper on which is written the following:

"We the Jury find for the Plaintiff a verdict for $63,048.60.

J. H. Conaway, Foreman."

And on the back of the foregoing petition is the following:

"We, the Jury, find for the Plaintiff, and assess his damages at Sixty Three Thousand Forty Eight Dollars and Sixty Cents.

J. H. Conaway, Foreman."

EXHIBIT "A" TO PETITION

A. SPATES BRADY

vs.

B. & O. R. R. et al.

Upon Petition

INTERSTATE COMMERCE COMMISSION

No. 15270

A. SPATES BRADY

vs.

BALTIMORE & OHIO RAILROAD COMPANY et al.

Submitted November 9, 1925. Decided May 10, 1926

[fol. 11] Acts and practices of defendants in according Western Maryland service to mines of the West Virginia Coal & Coke Company located on the Coalton

branch of the Baltimore & Ohio during the period from October 14, 1922, to April 1, 1923, while failing to accord similar service to complainant's mine located intermediate thereto found to have resulted in undue prejudice to complainant in the matter of car supply. To this extent previous findings in this case, 102 I. C. C. 19, reversed. Case held open to permit filing of petition for further hearing with respect to amount of damages.

George T. Bell for complainant.
Chas. R. Webber and Eugene S. Williams for defendants.

Report of the Commission on Reconsideration

By the COMMISSION:

Complainant mines and sells bituminous coal in his own name and in the name of the Mabie Coal Company. By complaint filed October 8, 1923, as amended, he alleges that the rates on coal, in carloads, from his mine at Mabie, W. Va., to destinations in other States reached by the Western Maryland, hereinafter called the Maryland, and its connections were and are unjust, unreasonable, and unduly prejudicial to complainant and his mine and his traffic, in that they exceeded the flat West Virginia basis of rates. He further alleges that the failure and refusal of defendants to serve his mine with cars and to interchange coal traffic from such mine to all interstate destinations reached by the Maryland and its connections, at some convenient point in the Elkins district of West Virginia, and to accord such traffic the flat West Virginia region basis of rates while according such service, cars, and rates to competing mines of the West Virginia Coal & Coke Company, hereinafter termed the coal company, has been and is unduly prejudicial to complainant and preferential of his competitor and subjects complainant to unjust discrimination, all in violation of sections 1, 2, 3 and 4 of the interstate commerce act. We are asked to require defendants to cease [fol. 12] and desist from the violations of the act complained of and to award reparation. The issues were made the subject of a hearing, and a proposed report by the examiner to which exceptions were filed by the complainant. Upon brief the prayers for relief under section 2 and para-

graph (3) of section 3 and all requests for future relief were withdrawn.

In the original report, 102 I. C. C. 19, division 5 found rates charged on coal, in carloads, from complainant's mine to Port Covington, Baltimore, Md., unreasonable and awarded reparation. It found that the allegation of undue prejudice in the matter of car supply was not sustained. Upon petition of complainant the proceeding was reopened for reconsideration on the present record.

Complainant's mine is located on a short spur leading off the Coalton branch of the Baltimore & Ohio, hereafter called the B. & O., less than .05 mile from Mabie, W. Va., and approximately 6.31 miles south of Norton, W. Va. It is intermediate to Coalton mine No. 1 and Mabie mine No. 6 of the coal company. These mines, in addition to Arianna mine No. 7 of the coal company are the only coal operations on the Coalton branch. Two other mines of the coal company, Norton Nos. 2 and 8, are located on what is known as the Norton branch of the B. & O. which leads off the Coalton branch about 0.48 mile south of Norton. The latter mine has never been operated. The Coalton and Norton branches of the B. & O. were formerly a portion of what was known as the Coal & Coke Railway.

The coals from complainant's mine and those of the coal company are of similar grade and complainant competes actively with the coal company in the sale of coal. Complainant's mine is and has been entirely dependent on the B. & O. for its car supply. The mines of the coal company prior to October 14, 1922, with the exception of Norton No. 2, were likewise entirely dependent upon the B. & O. for car supply.

On September 8, 1920, the B. & O., the Coal & Coke, and the Maryland entered into an agreement whereby the Maryland was given trackage rights over the Belington branch of the B. & O. from a connection near Belington, W. Va., to Norton, and thence over the Coalton and Norton branches so as to reach the mines of the coal company then in existence, or any others that might be opened by the [fol. 13] coal company during the life of the agreement. The pertinent portions of the agreement are as follows:

The Baltimore Companies hereby grant to the Maryland Company the right to operate engines, trains, and coal cars for a period of one year from the date hereof from the con-

nection near Belington over said tracks as indicated upon the plat attached, for the transportation of coal from the mines of the West Virginia Coal and Coke Company above mentioned, (Norton No. 2, Coalton No. 1, Mabie No. 6 and Arianna No. 7) and from any other mines opened or to be opened by said Coal Company on said Coalton branch or said Norton Extension, not exceeding forty (40) loaded coal cars per day, to be moved in not exceeding two trains each way per day.

Beginning one year from the date hereof and for a period of four years thereafter, the Baltimore Company hereby grant to the Maryland Company the right to operate engines, trains and coal cars from the connection near Belington over their tracks as indicated upon the plat attached, for the transportation of coal from the Norton Mine No. 2 of the West Virginia Coal & Coke Company, and from any other mines to be opened on said Norton Extension by said Coal Company and which can not be served by any other existing railroad facilities, not exceeding fifty (50) loaded cars per day, to be moved in not exceeding two trains each way per day.

The Maryland contracted with the coal company for 65 per cent of its fuel needs. The Maryland did not operate over or place any cars for loading at mines on the Coalton branch during the life of the agreement, but it did exercise and has since exercised its right under the agreement to reach Norton mine No. 2. It was originally planned to secure its fuel requirements from the latter mine. A witness for the Maryland testified that mine No. 2 was unable during the latter part of 1922 to meet its needs, and this necessitated the Maryland securing some coal from mines on the Coalton branch. Accordingly, on October 5, 1922, it was mutually agreed between the parties to extend the agreement dated September 8, 1920, so that it would become effective at once and continue until April 1, 1923. It was [fol. 14] further agreed that the Maryland had the right to move a maximum of 90 loaded cars per day from the mines of the coal company on the Coalton and Norton branches and that the Maryland would move empty cars received from the B. & O. at Monroe yards, near Norton, to mines ordering such cars from the B. & O. and return the cars when loaded to the B. & O., payment for such service to be agreed upon between the carriers. Complainant's cars

ordered from the B. & O. were handled in accordance with this agreement, except on a few occasions when the B. & O. performed its own service.

The complaint covers the period from September 1, 1922, to April 1, 1923. It is complainant's position that the acts and practices of defendants on and after October 14, 1922, when the Maryland began serving the coal company's mines on the Coalton branch, gave those mines the status of joint mines, namely, mines entitled to service by more than one carrier, and that his mine, being intermediate, was entitled to the same status and treatment.

In Ridge Coal Mining Co. vs. M. P. R. R. Co., 62 I. C. C. 259, we defined a joint mine as being one located on the rails of only one railroad but served by one or more additional railroads. In that case we also said:

* * * if a carrier extend its service by a trackage agreement to one mine on another line, it would be difficult, if not impossible, to justify a refusal to accord similar treatment to another intermediate competing mine located on the track over which it operated under the trackage agreement.

Under the car-distribution rules then in effect a mine served by two roads, if it confined its orders to one road, was permitted to order 100 per cent of its rating from that carrier. If it ordered cars from two carriers, it was permitted to order 75 per cent of its rating from each. See Fairmont & Cleveland Coal Co. vs. B. & O. R. R. Co., 62 I. C. C. 269. In Bell & Zoller Coal Co. vs. B. & O. S. W. R. R. Co., 74 I. C. C. 433, decided on December 11, 1922, we reversed the latter case, for reasons there stated, and found that a mine served by two carriers should not be permitted to order cars in excess of 100 per cent of its rating [fol. 15] from both roads serving it. It had a right to order its full rating from either of the roads, if it so desired. It also had a right to divide its orders between the two roads as desired, provided that the combined orders did not exceed 100 per cent of its rating.

Defendants contend that a joint-mine status was not conferred upon the mines of the coal company, because of an understanding which they had with the coal company to the effect that its mines were not permitted to order cars in excess of 80 per cent and 20 per cent of their rating from the Maryland and B. & O., respectively.

It is not necessary in the disposition of this case to determine whether or not the coal company was entitled to order its cars in conformity with existing car-service rules for joint mines and as to that we express no opinion. During a portion of the period covered by the complaint the rule was effective whereby a mine served by two roads was entitled to order as much as 75 per cent of its rating from either road or a total of 150 per cent from both roads. Except for approximately one week the coal company was restricted in its combined orders from both roads to 100 per cent of its rating. To offset this excess distribution the mines of the coal company were subsequently entirely eliminated from B. & O. distribution and from October 21, 1922, to the end of that month no cars were furnished by that line.

In his complaint complainant prays, in part, that defendants be required to accord to his mine treatment in service, cars, and rates to his mine similar to that accorded the mines of the coal company. Defendants contend that complainant was offered the same arrangement but he declined and can not therefore be heard to complain. Whether or not this is true and whether or not similar service was in fact offered complainant depends upon surrounding circumstances.

On October 27, 1922, the senior vice-president of the B. & O. wrote to the vice-president in charge of operation as follows:

Referring to the agreement made with the Western Maryland Railway whereby they have trackage rights to reach mines of the West Virginia Coal and Coke Com- [fol. 16] pany located on the Baltimore and Ohio's Coalton Branch:

The practical effect of this trackage agreement is to place these mines, for the purpose of car distribution, upon both the Baltimore & Ohio and Western Maryland Railroads, and as I understand the distribution rules, the operator might be entitled to an allotment of 75% of capacity upon each road. This was not the intent of this agreement, as I advised you in my memorandum of October 5th last that the West Virginia Company would look to the Western Maryland for the major portion of their

car supply, calling upon the Baltimore & Ohio only for cars required for coke and certain coal loading to points on or reached via the Baltimore & Ohio Railroad exclusively where they had certain contracts.

I am advised that customarily the West Virginia Company's westbound shipments have been on the basis of approximately 20% of their capacity, which I understand to be about 90 cars. I have accordingly agreed with Mr. Drennen that instead of taking as a base for car distribution 75% of their rated capacity that the Baltimore and Ohio will take 20% of mine capacity, or, say, 18 cars per day, as a base, these mines to be allotted such percentage of 18 cars as the percentage of all cars available in the region bears to the total percentage allowance for that region; that is, if we have a 60% distribution Mr. Drennen's company to receive 11 cars; if a 40% distribution his company to receive 7 cars, etc.

In connection with this agreement the supervisor of mine ratings for the B. and O. testified as follows:

Q. As I understand it, the number of cars which constituted the maximum which the Western Maryland was to be allowed to place, on the average, to these mines, was the number which the two railroads had considered constituted the business of the West Virginia Coal & Coke Company in the past via the Western Mayland, is that correct?

A. I rather think so, yes, about what they had been used to shipping via the B. & O.

Q. And the Western Maryland?

A. Well, yes, both ways, if you want to put it that way.

[fol. 17] Complainant testified in part as follows:

Q. Did you ever have this matter up with Mr. Byers, President of the Western Maryland Railway, and what was the occasion therefor?

A. In the latter part of October, 1922, Mr. Byers came to Elkins in his private car and I went to see him about the matter. I reviewed in detail the various efforts I had made to get treatment similar to that accorded the mines of the West Virginia Coal & Coke Company and told him how I

had been referred back and forth by the officials of his road and the Baltimore and Ohio. He listened very attentively to what I had to say, but would not say very much himself or volunteer any opinion regarding the situation. When I pressed him for some sort of an answer to my request for similar treatment, he finally stated that I should see Mr. Drennen, President of the West Virginia Coal & Coke Company. To this suggestion I replied that Mr. Drennen was not the President of the Western Maryland Railway and surely not running the railroad. Mr. Byers replied that the arrangement in effect at the mines of the West Virginia Coal and Coke Company was a contract arrangement brought about between Mr. Drennen and the Baltimore and Ohio Railroad and that if I wanted the same thing I would have to see Mr. Drennen.

* * * * * * *

Q. Did you follow Mr. Byers' suggestion and go to see Mr. Drennen?

A. Yes, I went right over to Mr. Drennen's office in Elkins and told him what Mr. Byers had said. Mr. Drennen stated that he was employed by the West Virginia Coal & Coke Company to get cars for his company and that that was the purpose of the arrangement so far as the West Virginia Coal and Coke Company was concerned. He further stated that he saw no reason why my mine should not be given a joint status and my being allowed to use that joint status in any way I saw fit.

It is clear from the above and other evidence of record that the arrangement whereby the coal company's car supply would be furnished by the Maryland and B. & O., respectively, in the proportion of 80 and 20 per cent was [fol. 18] adapted to the needs of the coal company based upon their past shipments. It is also clear that the arrangement was the result of conference and agreement with the president of the coal company. Similar consideration was not given complainant, but he was advised that cars would be supplied by both carriers only in the proportion of 80 and 20 per cent, as was done with the coal company. Can it then be said that the complainant was not subjected to undue disadvantage?

It is contended by defendants that the object of the agreement with the coal company was to give the Mary-

land a dependable source of fuel supply, but it is undisputed that the coal company also shipped commercial coal under the agreement.

There was much testimony that during this period there was a market for all coal which could be produced. There was also much testimony that the mines of the coal company were operating practically at capacity during this period and by reason of this were able to maintain a good supply of labor to the detriment of complainant due to inadequate car supply to the latter. Complainant testified that—

* * * I thought I was entitled to have my mine treated as a joint mine and to have the benefit of all the rights and privileges of a joint mine. I did not think that because the 20 per cent arrangement happened to suit the business of the West Virginia Coal and Coke Company, the same arrangement should be forced on me. The arrangement may have been satisfactory for the West Virginia Coal and Coke, as they had a fuel contract with the Western Maryland. It was not satisfactory to me because I was selling coal exclusively on the commercial market. An 80 per cent Western Maryland and 20 per cent Baltimore & Ohio might suit my business one day but not the next day, and in any event I did not think the Baltimore & Ohio had any right to even suggest that I should agree to order my cars and place my business on any arbitrary percentage basis simply because the Western Virginia Coal and Coke Company, for reasons of their own, were alleged to be willing to do the same thing. The mines of the West Virginia Coal and Coke Company have been given a joint status and on the basis of that joint status that company had entered into a fuel contract with the Western Maryland.

[fol. 19] My position was that my mine should be given a joint status and that I should be permitted to exercise my rights and privileges under such status in any manner I chose.

It was absolutely unpracticable to try to operate a mine under that condition. Your orders come in and you have to order your cars for shipment.

It is well established that a mine served by two roads enjoys advantages not possessed by a mine served by only

one road. The reasonable enjoyment of these advantages should be protected. We think also that carriers may not, by withholding their equipment or facilities, dictate or control the markets which a particular shipper shall seek or enjoy, while adapting their services to the needs of a competing shipper. In In Re Irregularities in Mine Ratings, 25 I. C. C., 286, we said:

* * * In the annually recurring period of shortage of coal cars there is a great demand for coal and, generally speaking, each mine, whether junction point or local, is able to sell all the coal it can mine and ship. If the junction-point mine, served by two lines, is permitted to assert its full capacity against each of those lines, it is able to secure 100 per cent of its needs whenever each of those lines has as much as 50 per cent car supply. * * * It would thus be able to work substantially full time, while the nearby local mine would be able to work only one-half or one-third time, and the result would be that miners and laborers would seek employment with the junction-point mine where they could work full time rather than with the local mine that was able to work but part of the time. This makes it impossible for the local mine owner to maintain an organization or to work his mine efficiently or economically, and imposes upon him an extra cost in the production of coal.

The same fundamental reasoning is applicable in the case before us. By fixing the proportion of car supply which the coal company would be furnished by the respecive carriers in conformity with its customary shipments and after conference with the president of the coal company these advantages were made available to the coal company. When [fol. 20] fixing the proportion of car supply which would be furnished by the respective carriers to complainant like consideration was not given, but he was offered arbitrarily and without regard for the requirements of his business that which had been arranged for his competitor after deliberation. Such service would not have been similar or on a basis of equality between the shippers. The complainant was subjected thereby to undue and unreasonable disadvantage. Under the circumstances complainant should have been permitted to divide his orders for cars to the

respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads.

Upon all the facts of record we find that the acts and practices of defendants whereby they accorded Maryland service to the mines of the West Virginia Coal & Coke Company located on the Coalton branch of the B. & O. during the period from October 14, 1922, to April 1, 1923, while failing to accord similar service to complainant's mine located intermediate thereto resulted in undue prejudice to complainant in the matter of car supply. To this extent the previous findings in this case are reversed.

We adhere to the previous finding that no undue prejudice in the car supply furnished complainant's mine prior to October 14, 1922, has been shown. We also adhere to the previous finding that the rate assailed was unreasonable and unduly prejudicial to the extent that it exceeded $2.84 per long ton; that complainant made the shipments as described and paid and bore the charges thereon; that he has been damaged to the extent of the difference between the charges paid and those which would have accrued under the rate which was found reasonable; and that he was entitled to reparation in the sum of $262.23, with interest.

The extent of complainant's damage, if any, resulting from undue prejudice in the matter of car supply during the period from October 14, 1922, to April 1, 1923, has not been proved and the amount of reparation due can not, therefore, be determined upon this record. The case will be held open for a period of 60 days from the service of this report to permit the filing of an appropriate petition for further hearing with respect to the amount of damages, if any, sustained.

[fol. 21] EXHIBIT "B" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 15270

A. SPATES BRADY

vs.

BALTIMORE & OHIO RAILROAD COMPANY et al.

Submitted July 13, 1928. Decided February 28, 1929

Upon further hearing, reparation awarded to complainant because of undue prejudice found in our former report, 112 I. C. C. 244, to have existed in the distribution of coal cars

George T. Bell for complainant.

Charles R. Webber and Eugene S. Williams for defendants.

REPORT OF THE COMMISSION ON FURTHER HEARING

By the COMMISSION:

Exceptions were filed by complainant and defendants to the report proposed by the examiner, and oral argument was had. Our conclusions differ from those proposed by the examiner.

Previous reports in this case appear in 102 I. C C. 19 and 112 I. C. C. 244. In the latter report on reconsideration we found, at page 251:

that the acts and practices of defendants whereby they accorded Maryland service[1] to the mines of the West Virginia Coal & Coke Company located on the Coalton branch of the Baltimore & Ohio Railroad Company[2] during the period from October 14, 1922, to April 1, 1923, while failing [fol. 22] to accord similar service to complainant's mine located intermediate thereto resulted in undue prejudice to complainant in the matter of car supply.

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[1]By "Maryland service" was meant car service by the Western Maryland Railway Company.

[2]Hereinafter referred to as the B. & O.

The case was held open to permit the filing of a petition for further hearing on the amount of damages, if any, sustained. Such further hearing has been had, and this report deals with the amount of damages.

During the period in question the Western Maryland operated over the Coalton branch of the B. & O. under a trackage agreement. A severe shortage of coal cars existed throughout such period. In this coal-producing district the percentage of orders for coal cars which were filled by the B. & O. was lower than the percentage filled by the Western Maryland. Complainant's mine was being served exclusively by the B. & O. He desired to order cars from the Western Maryland, and through verbal and written communications the matter was brought to the attention of B. & O. and Western Maryland officials. Complainant was informed that his competitors on the B. & O. Coalton branch were ordering 20 per cent of their car supply from the B. & O., and 80 per cent from the Western Maryland, and that a division of his orders on that basis would be acceptable. This proposition was rejected, as complainant desired to place orders for car supply with either or both carriers as he saw fit. At the hearing on damages, a witness for complainant denied that his mine was offered the 20-80 basis, but the contrary is clearly and repeatedly shown by testimony of the same witness at the first hearing.

In our report on reconsideration we found, at page 250, that "complainant should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads."

Complainant in fact ordered a 100 per cent supply of cars from the Western Maryland, but since that defendant would not honor his requisitions on that basis, he also placed his order with the B. & O.

The damage claims rest upon the theory that by reason of defendants' action complainant was precluded from [fol. 23] utilizing the car supply of the Western Maryland, and that losses were suffered in two respects, viz, (1) loss of profits on coal that could have been produced had additional cars been available, and (2) increased cost of producing the coal which was produced and sold.

During the period in question complainant's mine had a daily car rating of 10.2 for October, 10.7 for November, 11.3 for December, 12.6 for January, 12.7 for February, and 13.8 for March. The following statement shows percentages of cars available to cars ordered on the B. & O. and Western Maryland in the district[3] in which complainant's mine is located:

	B. & O.	Western Maryland
October, 1922	34.96	58
November, 1922	22.9	54
December, 1922	24.4	68
January, 1923	24	69
February, 1923	30.7	57
March, 1923	25.7	52

The cars ordered by complainant from the Western Maryland are excluded from the above computation. By including such cars in the total the Western Maryland percentages of cars available to cars ordered would have been 54.63, 48.95, 61.91, 61.12, 49.87, and 44.5 for the respective months. Complainant began to order cars from the Western Maryland on October 17. During the balance of that month and in the succeeding months of the period it ordered from that carrier 130, 252, 315, 288, and 291 cars, respectively. Based upon the revised percentages, complainant would have been entitled to receive from the Western Maryland 71 cars in October, 125.5 cars in November, 156 cars in December, 192.5 cars in January, 143.6 cars in February, and 129.5 in March, or a total of 818.1 [fol. 24] cars during the period. He actually received 5 cars from the Western Maryland and 367.8 from the B. & O., divided as follows: October, 25; November, 73; December, 58.2; January, 73; February, 65.5; and March, 78.1.

The cars furnished were loaded with an average of 53.55 tons of coal per 50 foot car. The tonnage claimed to have been lost, because of defendants' practices, is obtained by multiplying the number of additional cars which he would

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[3]This district is designated the Charleston district by the B. & O. and the Weaver district by the Western Maryland.

have received each month if the Western Maryland had honored his requisitions by 53.55 tons. This computation shows the tonnage lost to have been 2,463 tons in October; 2,811 tons in November; 5,237 in December; 6,399 tons in January; 4,182 tons in February; and 2,752 tons in March.

The coal produced at complainant's mine is a highgrade bituminous coal. During the period in question there was an unusually active demand for such coal, but because of car shortage complainant was unable to fill his orders. The unusual demand continued until March, 1923, when it abated to some extent, but there was sufficient demand to have taken care of all of the coal complainant could have produced during that month.

In computing the excess cost of the tonnage actually produced, which complainant claims he is entitled to recover, the mining costs were divided into fixed and variable charges. The fixed charges are those which are not affected by the tonnage produced, and include main-line track and timbering labor at the mine, drainage labor and fuel consumed in connection therewith at the mine, stable labor and supplies, foreman and mine-office expenses, supplies and maintenance, main-office expenses, 10 per cent annual depreciation of mine machinery and equipment, charged on a monthly basis, taxes and insurance, legal and engineering expenses, and sales expense. The variable charges include the following: Pick mining, driving, motor labor, dumping and shifting, switching, weighing, locomotive and ventilation fuel, royalty and liability insurance. The variable charges change with the amount of tonnage produced.

The following table, which is a partial reproduction of one of complainant's exhibits, contains data compiled from his books and records:

[fol. 25]

	October	November	December	January	February	March
Net tons produced	3,014.45	3,560.45	3,131.60	3,763.4	3,393.4	3,973.25
Total fixed charges	$2,598.43	$2,735.45	$3,617.70	$3,343.07	$2,837.19	$2,386.81
Total variable charges	4,056.08	5,088.71	4,316.59	5,285.13	4,532.76	5,165.17
Total cost	6,654.51	7,824.16	7,934.29	8,628.20	7,369.95	7,551.98
Fixed charges per ton	.8619	.7683	1.1555	.8882	.836	.6008
Variable charges per ton	1.3456	1.4292	1.3789	1.4044	1.3358	1.2999
Total cost per ton	2.2075	2.1975	2.5344	2.2926	2.1718	1.9007
Total realization	11,048.24	13,328.18	11,711.70	16,440.36	12,505.80	11,505.92
Realization per ton	3.665	3.743	3.735	4.369	3.685	2.896

[fol. 26] If complainant had received the additional cars to *to* which he claims he was entitled, he could have produced, at 53.5 tons per car, the following tonnage of coal:

October	November	December	January	February	March
5,477	6,371	8,369	10,162	7,575	6,725

Based upon such tonnages, the fixed charges per ton would have been reduced to the following:

October	November	December	January	February	March
$0.474	$0.429	$0.433	$0.329	$0.375	$0.355

The differences between these amounts and the fixed charges per ton on the coal actually produced measure the excess cost per ton which complainant contends was incurred because of defendants' unlawful practices. These differences are as follows:

October	November	December	January	February	March
$0.388	$0.339	$0.722	$0.559	$0.461	$0.246

The total excess mining costs of the tonnage actually produced were obtained by multiplying these amounts by the number of tons. So computed, these excess costs were as follows:

October	$1,169.61
November	1,206.99
December	2,261.02
January	2,103.74
February	1,564.36
March	977,42
Total	9,283.14

Complainant's method of determining the profits lost on unmined tonnage which could have been produced is to deduct the sum of the variable cost per ton of the coal actually mined and the fixed cost per ton of the total which could have been produced, from the average price per ton received for the former, and then multiply the differences by the number of additional tons which could have been [fol. 27] produced. So arrived at, the costs per additional ton would have been as follows:

October	November	December	January	February	March
$1.82	$1.858	$1.812	$1.733	$1.711	$1.655

Deducting the above amounts from the average prices per ton received for the coal actually mined, the profit per additional ton would have been as follows:

October	November	December	January	February	March
$1.845	$1.885	$1.923	$2.636	$1.974	$1.241

On this basis the profits lost were as follows:

October	November	December
$4,544.23	$5,298.73	$10,070.75

January	February	March
$16,867.76	$8,255.27	$3,415.23

or a total of $48,451.97.

The excess mining costs, amounting to $9,283.14, plus the lost profits, amounting to $48,451.97, gives a total of $57,735.11, which complainant claims is the amount of the damages which he sustained.

Defendants do not question the method or figures used by complainant in this computation. They contend, however, that complainant did not actually suffer any damages, because his mine had an inflated rating and received or was offered during the period involved more cars than it was entitled to receive. They also contend that the evidence offered in proof of the damages alleged to have been sustained is too indefinite to justify an award. They contend, further, that even if this evidence is sufficiently definite, we must take into consideration in mitigation of the damages the number of cars complainant would have received, had he accepted the 20-80 offer, described above and also in the former report, which defendants made to him.

Practically all of the evidence introduced by defendants is in support of their contention that complainant's mine was excessively rated, and that he received all of the cars to which he would have been entitled if it had been properly [fol. 28] rated. Under the rules and practices in effect during the period involved, all mines served by defendants were rated in the following manner: At the close of each working day a written report of the operations at the mine was furnished to a representative of the carrier on whose line the mine was located. This report showed, among other things, the amount of tonnage produced, the time consumed in production, the number of cars loaded, the amount

of tonnage awaiting placement of cars for loading, and the number of cars desired on the following working day. At the end of the month, a report, sworn to and compiled from the data in the daily reports, was furnished to the carrier's representative. The superintendent of mine ratings of the B. & O. assigned monthly ratings to the mines on its line, based upon the information in these daily and monthly reports. These ratings were for the succeeding month, beginning with the tenth day. Thus, the rating of a mine from November 10 to December 10 was based on its performance during October.

Although the ratings of complainant's mine are attacked, defendants made no showing as to the ratings of other mines in the district. Assuming inflation in the case of complainant's mine, the effect of such inflation upon his car supply would have been materially lessened or perhaps entirely overcome if the ratings of other mines within the district were also inflated. The duty of maintaining and applying just and reasonable mine ratings during periods of car shortage rests upon the carriers. While this would not in any way justify the rendering of incorrect reports by complainant, defendants can not properly, in view of their duty and in a proceeding such as this, attack the ratings established for complainant's mine without showing the situation as to other mines.

It is a familiar rule that a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss. United States vs. F. & G. Co., 236 U. S. 512; Warren vs. Stoddart, 105 U. S. 224; Western Real Estate Trustees vs. Hughes, 172 Fed. 206; Hall vs. Paine, 112 N. E. 153. That principle is applicable here. By reasonable action on his part in accepting defendants' 20-80 offer, complainant could have increased his produc-[fol. 29] tion to the extent of 1,825 tons in October, 1,940 tons in November, 3,960 tons in December, 4,950 tons in January, 2,545 tons in February, and 1,485 tons in March. To this extent his damage was due to his own action and defendants can not reasonably be expected to compensate him therefor. Complainant also erred in computing the tonnage that he could have produced, if he had been allowed to avail himself of the Western Maryland's car supply, by using an average loading of 53.55 tons per car. Under the rules 50 tons is used in determining the daily car

rating and is likewise used in the rules governing distribution to coal mines. Making the latter correction, the profit per ton, if complainant had been permitted to order 100 per cent of his rating from the Western Maryland, would have been as follows:

October	November	December	January	February	March
$1.831	$1.872	$1.905	$2.621	$1.961	$1.231

The difference between the tonnage which complainant could have produced by accepting defendants' offer and that which could have been produced, if he had been permitted to order his full rating from the Western Maryland, was as follows:

October	November	December	January	February	March
475	685	930	1,025	1,360	1,085

The application of the average lost profit per ton during the respective months to the tonnage shown gives a total of $10,612.82, which is the amount of profit lost by complainant because of defendants' unlawful practices.

Making the correction indicated above with respect to tonnage per car, the fixed charges per ton, if complainant had been permitted to order 100 per cent of his rating from the Western Maryland, would have been as follows:

October	November	December	January	February	March
$0.488	$0.442	$0.451	$0.3433	$0.388	$0.365

[fol. 30] If defendants' offer had been accepted and cars furnished on that basis, the fixed charges per ton would have been as follows:

October	November	December	January	February	March
$0.537	$0.497	$0.510	$0.383	$0.477	$0.437

and the tonnage produced would have been increased to the following:

October	November	December
4,839.45	5,500.45	7,091.60

January	February	March
8,713.4	5,938.4	5,458.25

Multiplying the difference between the fixed charges per ton on the two bases by the number of tons indicated for

the respective months gives an excess mining cost of $2,225.49. To this should be added the lost profit of $10,612.82, making a total of $12,838.31. This is the amount of complainant's damage for which defendants are jointly responsible. As before stated, defendants contend that the proof of damages is too indefinite to justify an award. However, after making the necessary corrections, the damages claimed have, we think, been proved with reasonable certainty, which is all that the law requires. Avella Coal Co. vs. P. & W. Ry. Co., 77 I. C. C. 731, 740.

We find that by reason of the undue prejudice found to have existed complainant was damaged in the total sum of $12,838.31, and is entitled to reparation in this sum with interest.

A motion filed by defendants at the time of argument that we reconsider their previous motion to reopen this case in order that evidence excluded by the examiner with respect to inflation of complainant's mine rating might be put in evidence is denied.

It appears that the B. & O. and the Western Maryland are equally and jointly responsible for the damages sustained by complainant.

An order giving effect to these findings will be entered.

[fol. 31] EXHIBIT "C" TO PETITION

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 28th Day of February, A. D. 1929

No. 15270

A. SPATES BRADY

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY and WESTERN MARYLAND RAILWAY COMPANY

Order

It appearing that on May 10, 1926, the commission entered its report in the above-entitled proceeding, and said

proceeding coming on for further hearing with respect to reparation, which further hearing has been had, and the commission having, on the date hereof, made and filed its report on further hearing containing its findings of fact and conclusions thereon, which report and the said report of May 10, 1926, are hereby referred to and made a part hereof.

It is ordered that the above-named defendants be, and they are hereby authorized and directed to pay unto the complainant, on or before May 1, 1929, the amount of $12,838.31 with interest thereon at the rate of 6 per cent per annum from April 1, 1923, as reparation on account of unduly prejudicial practices in the distribution to complainant's mine of coal cars for use in interstate commerce, and

It is further ordered that defendants' motion that we reconsider their previous motion to reopen this proceeding be, and it is hereby, denied.

By the Commission.

George B. McGinty, Secretary.

[fol. 32] In United States District Court

Law. No. 351—Elkins

Return of Service of Petition—Filed February 17, 1930

United States Marshal's Return

I hereby certify and return that on the 12th day of February, 1930, at Elkins, Randolph County, West Virginia, I served the Western Maryland Railway Company, a corporation, with this petition, by delivering to H. H. Kerr, Agent of the said Western Maryland Railway Company, a corporation, at Elkins, West Virginia, a duly certified copy of said petition and at the same time exhibited to him the original thereof.

The president, vice-president, secretary, treasurer, or person duly appointed by law to accept service of process for it, not found in my District.

Harry A. Weiss, United States Marshal N. D. West Va., by J. W. Koontz, Deputy.

Law. No. 351—Elkins

United States Marshal's Return

I hereby certify and return that on the 11th day of February, 1930, at Parkersburg, Wood County, West Virginia, I served the Baltimore & Ohio Railroad Company, a corporation, with this petition, by delivering to F. A. Carpenter, Agent of the said Baltimore & Ohio Railroad Company, a corporation at Parkersburg, West Virginia, a duly certified copy of said petition and at the same time exhibited to him the original thereof.

The president, vice-president, secretary, treasurer or person duly appointed by law to accept service of process for it, not found in my district.

Harry A. Weiss, United States Marshal N. D. West Va., by Hal M. Rapp, Deputy.

[fol. 33] In United States District Court

Appearance of Counsel for Defendants—Filed March 10, 1930

To A. C. Merrill, clerk of said court:

Please note my appearance as counsel for the defendants in the above styled case, this March 10, 1930.

E. A. Bowers.

In United States District Court

Demurrer on Behalf of The Baltimore and Ohio Railroad Company—Filed March 10, 1930

The defendant The Baltimore and Ohio Railroad Company, a corporation, demurs to the petition and each paragraph or count thereof filed in this action, and for grounds of demurrer says that said petition is not sufficient in law.

E. A. Bowers, Attorney for Defendant The Baltimore and Ohio Railroad Company.

In United States District Court

Demurrer on Behalf of Western Maryland Railway Co.—Filed March 10, 1930

The defendant Western Maryland Railway Company, a corporation, demurs to the petition and each paragraph or count thereof filed in this action, and for grounds of demurrer says that said petition is not sufficient in law.

E. A. Bowers, Attorney for Defendant Western Maryland Railway Company.

[fol. 34] In United States District Court

Demurrer Assigning Grounds on Behalf of B. & O. R. R. Co.—Filed March 12, 1930

Defendant The Baltimore and Ohio Railroad Company, a corporation, demurs to plaintiff's petition herein and for cause of demurrer says:

First. The demand or claim asserted in the petition is not on the award of the Interstate Commerce Commission mentioned in said petition nor for the recovery of the same but is for a different sum than the amount of the alleged award of the Interstate Commerce Commission and is for an amount largely in excess of the award of said Commission described by said petition, and no action, as described by plaintiff's petition, can be maintained by him.

Second. The plaintiff has no right of action as asserted in his petition to cause this Court of law to consider, review, revise or reverse the award of the Interstate Commerce Commission described by said petition, nor has this Court jurisdiction to consider, review, revise or reverse said award made by said Interstate Commerce Commission.

Wherefore defendant prays judgment of this Court whether it shall make other further plea or defense to said petition.

E. A. Bowers, Attorney for The Baltimore and Ohio Railroad Company, a Defendant.

In United States District Court

Demurrer Assigning Grounds on Behalf of Western Maryland Railway Co.—Filed March 12, 1930

Defendant Western Maryland Railway Company, a corporation, demurs to plaintiff's petition herein and for cause of demurrer says:

First. The demand or claim asserted in the petition is not on the award of the Interstate Commerce Commission [fol. 35] mentioned in said petition nor for the recovery of the same but is for a different sum than the amount of the alleged award of the Interstate Commerce Commission and is for an amount largely in excess of the award of said Commission described by said petition, and no action, as described by plaintiff's petition, can be maintained by him.

Second. The plaintiff has no right of action as asserted in his petition to cause this Court of law to consider, review, revise or reverse the award of the Interstate Commerce Commission described by said petition, nor has this Court jurisdiction to consider, review, revise or reverse said award made by said Interstate Commerce Commission.

Wherefore defendant prays judgment of this Court whether it shall make other further plea or defense to said petition.

E. A. Bowers, Attorney for Defendant Western Maryland Railway Company.

In United States District Court

General Issue Plea on Behalf of B. & O. R. R. Co.—Filed March 12, 1930

And the defendant The Baltimore and Ohio Railroad Company, a corporation, by E. A. Bowers, its attorney, comes and defends the wrong and injury, when, etc., and says that it did not promise in the manner and form as the plaintiff has above thereof complained against it; and this defendant further says that it is not guilty of the grievances

laid to its charge in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country.

E. A. Bowers, Attorney for Defendant The Baltimore and Ohio Railroad Company.

[fol. 36] In United States District Court

General Issue Plea of Western Maryland Railway Co.—Filed March 12, 1930

And the defendant Western Maryland Railway Company, a corporation, by E. A. Bowers, its attorney, comes and defends the wrong and injury, when, etc., and says that it did not promise in the manner and form as the plaintiff has above thereof complained against it; and this defendant further says that it is not guilty of the grievances laid to its charge in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country.

E. A. Bowers, Attorney for Defendant Western Maryland Railway Company.

In United States District Court

Order—Demurrers Overruled—Filed and Entered July 14, 1931

On this 14th day of July, 1931, came the parties by their attorneys, and the court having considered the demurrers to the petition heretofore filed in this case, doth overrule said demurrers.

Enter.

W. E. Baker, Judge.

[fol. 37] In United States District Court

Order—Jury Impaneled, Reporter Sworn, etc.—Entered July 22, 1931

This 22nd day of July, 1931, came the parties hereto—the plaintiff in person and by S. T. Spears and George T.

Bell, his counsel, and the defendant Baltimore & Ohio Railroad Company by Charles R. Webber, its counsel, and Western Maryland Railway Company by Eugene S. Williams and John F. Brown, its counsel. And thereupon the plaintiff replying generally to the plea of the defendant Baltimore & Ohio Railroad Company and to the plea of Western Maryland Railway Company, which pleas were filed herein on March 12, 1930, issues are thereon joined.

On motion of the plaintiff Kemble T. Manning, a competent reporter, was duly sworn in open court as the official court reporter in this case.

Thereupon came a jury, to-wit: William Talbott, Delbert W. Zinn, H. G. Glover, W. A. Schaeffer, John Conway, W. Scott Jackson, F. W. Brinkman, C. W. Marquess, E. C. Shaw, Goffe Wilson, Jefferson Pritt, and H. W. Bonner, twelve good and lawful men duly selected, tried and sworn as the law directs to well and truly try the issues joined and a true verdict render according to law and the evidence; which jury having heard the opening statements of counsel and the evidence adduced and the hour of adjournment having arrived, were adjourned over until nine-thirty tomorrow morning, to which time the trial of this case is continued.

NOTE BY DISTRICT CLERK

Court minutes showing continuance of the trial of this case were duly entered of record on July 23, 24, 25, 27, 28, 29, 30, 31, August 1, 3, 5 and 6th.

On the 4th day of August, the following minute of Court was entered of record:

[fol. 38] IN UNITED STATES DISTRICT COURT

ORDER—PLAINTIFF'S MOTION TO DIRECT A VERDICT OVERRULED

This 4th day of August, 1931, came again the parties hereto as on yesterday, and came also the jury heretofore impaneled and sworn in this case and as constituted on yesterday, which jury having heard the conclusion of the evidence on behalf of the parties were adjourned until tomorrow morning at ten o'clock.

Thereupon, the plaintiff, out of the hearing of the jury, moved the Court to exclude the testimony offered on behalf of the defendants and to direct a verdict in his favor, which motion being argued by counsel, and considered by the Court, was overruled by the Court; to which ruling of the Court the plaintiff excepted. And the hour of adjournment having arrived the Court was adjourned until tomorrow morning at ten o'clock to which time the trial of this case is continued.

IN UNITED STATES DISTRICT COURT

ORDER—VERDICT—Entered August 7, 1931

This 7th day of August, 1931, came the parties hereto and came also the jury heretofore impaneled and sworn in this cause and as constituted on yesterday, which jury heard the instructions of the Court and retired to their room to consider of their verdict and, after a time, returned into Court and upon their oaths say:

"We, the Jury, find for the plaintiff, and assess his damages at Sixty-three thousand forty-eight dollars and sixty cents.

J. H. Conaway, Foreman."

Thereupon the defendants moved the Court to set aside the said verdict of the jury as contrary to the law and evidence and as excessive, which motion being considered by the Court, was overruled and said defendants' exception thereto was saved to them and each of them.

Thereupon, the plaintiff moved the Court to make an allowance to him for attorney's fees in this case, which motion is taken under consideration by the Court.

[fol. 39] IN UNITED STATES DISTRICT COURT

ORDER—JUDGMENT—Filed and Entered Sept. 5, 1931

On this 5th day of September, 1931, came the parties by their attorneys and the plaintiff moved for judgment upon the verdict of the jury heretofore awarded, and the Court being of the opinion that the motion for attorneys' fees should be considered and passed upon at a later date and

the Court having heretofore overruled the defendants' motion to set aside the verdict of the jury, plaintiff's motion for judgment is sustained and to the action of the Court in sustaining said motion defendants and each of them except. It is therefore considered by the Court that the plaintiff, A. Spates Brady, recover of and from the defendants, The Baltimore and Ohio Railroad Company, a corporation, and Western Maryland Railway Company, a corporation, the sum of $63,048.60, that being the amount of the verdict of the jury, with interest thereon from the 7th day of August, 1931, the date of said verdict, until paid, and his costs. All questions arising on the motion of plaintiff for the allowance of attorneys' fee, are hereby reserved for the future order of the Court.

Enter.

September 5th, 1931.

W. E. Baker, Judge.

In United States District Court

Defendants' Notice, with Acceptance of Service, of Time and Place of Presentation of Bill of Exceptions—Filed December 2, 1931

To A. Spates Brady, plaintiff:

Please take notice that on Thursday, December 3rd, 1931, defendants will lodge in the Clerk's Office of the above Court at Elkins, West Virginia, for your inspection their narrative statement of the evidence in the above-styled suit which is contained in and made part of defendants' Bills of Exception, which will also then and there be lodged in [fol. 40] said Clerk's office for your inspection, and will on Monday, December 14th, 1931, before the Judge of said Court at the Courthouse of the United States at Elkins, West Virginia, move the said Judge or the said Court, if it is then and there sitting, to approve said narrative statement of evidence and to sign, seal and make said bills of exception part of the record in said suit on appeal.

Western Maryland Railway Company and Baltimore and Ohio Railroad Company, Defendants, by Eugene S. Williams, Charles R. Weber, E. A. Bowers, John F. Brown, Attorneys.

(On reverse side)

Within notice is hereby accepted this Dec. 2, 1931, for A. Spates Brady.

S. T. Spears, of Atty. of Record for A. Spates Brady.

In United States District Court

Assignments of Error—Filed Dec. 3, 1931

Come now The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, defendants in the above entitled action, and file their Assignments of Error in the record of said action and in the judgment therein, upon which errors they will rely upon their appeal from said judgment entered by the United States District Court for the Northern District of West Virginia on September 5, 1931; which assignments and specification of error follow:

1. The Court erred in overruling defendants' demurrers to plaintiff's petition by order of said Court entered on July 14, 1931.

[fol. 41] 2. The Court erred in permitting plaintiff to put in evidence the report of the Interstate Commerce Commission dated May 10, 1926, in I. C. C. Docket No. 15270, A. Spates Brady vs. The Baltimore and Ohio Railroad Company, et al., and the order of the Commission in the said proceeding dated February 28, 1929, for the limited purpose only of showing the findings of the Commission in its administrative capacity, as shown in said order and report; likewise the report of the Commission dated February 28, 1929, and its order of the same date, in the same proceeding, for the limited purpose of showing damages sustained by the plaintiff, growing out of the facts found by the Commission in its report of May 10, 1926, to the extent of $57,735.11 as of April 1st, 1923, including that portion of said report and order reducing the damages to $12,838.31.

3. The Court erred in refusing to permit defendants to introduce in evidence the report of Division 5 of the Inter-

state Commerce Commission in the same proceeding dated July 24, 1925; and in refusing to permit defendants to introduce in evidence that Commission's report and order dated February 28, 1929, for the limited purpose of showing the finding by the Commission that the plaintiff was offered 80% car supply from the Western Maryland and 20% from the Baltimore and Ohio and refused to accept the same, and by his refusal lost profits of $48,451.97; and in further refusing to permit defendants to offer said report and order of February 28, 1929, for whatever said report and order may show and for all relevant purposes; and in further refusing to permit defendants to offer said report and order, except that those portions thereof which showed that defendants had offered plaintiff 20% Baltimore and Ohio and 80% Western Maryland car supply should not be received in evidence.

4. The Court erred in holding and remarking to the jury that the Interstate Commerce Commission found that plaintiff was under no obligation to accept the cars offered him on the basis of 20% from the Baltimore and Ohio and 80% from the Western Maryland, and that the Commission further found for plaintiff to have done so would have clearly been a violation of law; also in refusing to correct said [fol. 42] statement in his general charge to the jury.

5. The Court erred in refusing to permit cross examination of the plaintiff on matters relating to the productive capacity of the mine and to the offer by defendants to plaintiff of 80% Western Maryland and 20% Baltimore and Ohio car supply by way of defense, on the theory that defendants had no greater latitude in developing matters of defense from the plaintiff on cross-examination than from plaintiff's witnesses.

6. The Court erred in permitting plaintiff to testify that he could have loaded the additional cars he received with an average of 53.55 tons of coal, whereas plaintiff's rating was determined on the basis of 50 ton cars.

7. The Court erred in permitting plaintiff to testify as to cars left standing over on certain days at the mines of the West Virginia Coal & Coke Company, the plaintiff admitting that those cars were charged against said company and further admitting that he did not know whether the

cars were for railroad fuel or were bad order cars; also in permitting plaintiff to testify that more cars were placed on certain occasions at the mines of the West Virginia Coal & Coke Company by the Western Maryland than were ordered, the evidence having shown that this was for the operating convenience of the Western Maryland, and to assure it an adequate fuel supply.

8. The Court erred in permitting plaintiff to show that the Baltimore and Ohio allowed shortages to accrue at plaintiff's mine on occasions, whereas the suit is based upon the failure of the Western Maryland to accord plaintiff car supply on the basis of 100% of his mine ratings.

9. The Court erred in refusing to permit defendants to introduce in evidence by their own witnesses' testimony and a letter from the Baltimore and Ohio Superintendent to plaintiff, showing that plaintiff was not legally discriminated against in that he was offered the same basis of car supply as was given his competitor, the West Virginia Coal [fol. 43] & Coke Company, that is, 20% Baltimore and Ohio and 80% Western Maryland car supply.

10. The Court erred in refusing to permit defendants to prove that, if plaintiff had accepted the car service offered him on the basis of 20% of his ratings by the Baltimore and Ohio and 80% by the Western Maryland, and had ordered his full rating, he could have received and shipped at the same freight rate 729.4 cars—in view of the fact that plaintiff actually received only 372.8 cars but would have been entitled to 810.5 cars if permitted to order his full rating from the Western Maryland, and claims as his damage the lost profits on the coal he would have shipped in the 437.7 cars additional he would have received if permitted to order exclusively from the Western Maryland.

11. The Court erred in refusing to permit defendants to introduce in evidence the certified official reports of C. W. Stuart and S. E. Hawkshaw, State Mine Inspectors of West Virginia, to the Department of Mines of that state, of the results of their examination of plaintiff's mine on September 9, 1919, January 20th, May 5th and August 13th, 1920, March 1st, 1921, January 7th, August 31st and November 17th, 1922, and February 8, 1923, showing the number of men employed and other characteristics of the mine affecting its

productive capacity; and in refusing to permit said witnesses to testify that the average production per pick miner in West Virginia is about 5¼ tons per day; also the conditions they found in Brady Mine on said inspections and in what respect conditions were less favorable for the high rate of production of coal per miner in plaintiff's mine than in the mines of the West Virginia Coal Company, defendants having shown elsewhere that the production in said mine averaged 12 to 13 tons per day during the best period.

12. The Court erred in refusing to permit defendants to prove that plaintiff's mine was inspected on June 5, 1923, for the purpose of checking the correctness of plaintiff's mine rating which had been established by the Baltimore and Ohio on the time reported to that defendant by plaintiff [fol. 44] in the aforesaid daily and monthly reports, and that as a result of said inspection made jointly by the Baltimore and Ohio Field Supervisor of Mine Ratings and plaintiff's Mine Superintendent, the existing rating of 14.2 cars was reduced to 7.2 cars, that plaintiff offered no objection to the revised rating and that said Mine Superintendent acquiesced therein and admitted that the revised rating of 7.2 cars was liberal; the Court further erred in refusing to admit in evidence the reports of said Field Supervisor of Mine Ratings to the Baltimore and Ohio of the conditions existing at said mine which formed the basis of the reduction of the mine rating; also in refusing to admit in evidence Baltimore and Ohio published bulletins for June and July, showing the revised rating of said mine, and showing that the ratings of the mines of the West Virginia Coal & Coke Company and other mines were not substantially changed as a result of inspections on or about June 5, 1923.

13. The Court erred in refusing to permit defendants to prove through plaintiff's Assistant Mine Foreman, H. O. Brandon, that plaintiff's mine could not produce more than 5 railroad cars per day; that on different occasions during the period involved the mine was unable to load 4 cars in 8 hours; that the only way the mine was able to load as many as 7 or more cars, which it did load on various occasions, was by having the coal previously stocked up in the mine cars and on the floor of the mine ready for loading; also that the mine could not and did not produce the coal shipped on numerous dates throughout the period involved in the

time reported by plaintiff to The Baltimore and Ohio Railroad Company in plaintiff's daily mine reports, on which said reports and the time therein reported as having been consumed in producing the coal plaintiff's mine ratings were fixed by said Baltimore and Ohio.

14. The Court erred in refusing to permit defendants to prove, through various miners who worked in plaintiff's mine during the period, how much coal the various miners then at work produced per day, and how much coal the mine produced per day when it started "clean" in the morning, without an accumulation of coal on hand from a previous day's work; and further in refusing testimony of the miners [fol. 45] that the mine could only load 3 to 4 cars per 8-hour day.

15. The Court erred in refusing to permit defendants to introduce testimony and exhibits showing errors in the mathematical computation of damages suffered by plaintiff, as set forth in the Commission's report of February 28, 1929.

16. The Court erred in refusing to permit defendants to introduce in evidence testimony and exhibit computations made from plaintiff's payrolls as to the time actually worked by plaintiff's "day men" at the mine, for the purpose of showing that plaintiff had greatly understated in his daily and monthly reports to the Baltimore and Ohio the time consumed in producing the coal in the mine and on the tipple.

17. The Court erred in refusing to permit defendant, Western Maryland, to prove that it stood ready to furnish car supply to plaintiff's mine if the Baltimore and Ohio, whose tracks afforded the only means by which the Western Maryland could reach plaintiff's mine, would permit the Western Maryland to do so.

18. The Court erred in permitting plaintiff to offer in rebuttal the testimony of witness Rowan as to how much coal he had produced in Brady Mine on one particular day long prior to the period involved in this suit; also in permitting plaintiff's Mine Superintendent to testify as to the amount of coal a single miner produced in Brady mine long prior to the period involved; also his estimated average production per miner at a time long prior to the period

involved; also in permitting plaintiff to testify how much coal a single miner produced in a particular period in a different part of the state at some undisclosed time. The Court further erred in permitting plaintiff to prove that on one particular day in the latter part of March he counted the men at work in the mine and found there were more than the payroll shows for that period.

19. The Court erred in admitting evidence by plaintiff that the mines of the West Virginia Coal & Coke Company [fol. 46] were furnished cars when plaintiff's mine was not, the evidence in the case showing that the greater part of the output of said mines was being supplied under contract as fuel coal for the Western Maryland.

20. The Court erred in not permitting defendants to develop on cross examination of plaintiff and his Sales Manager that plaintiff's mine became practically exhausted between the period involved in the suit and the date of the trial in this proceeding; that plaintiff had sold the remaining coal at profitable prices, and had not made allowance therefor in the damages testified to by him.

21. The Court erred in admitting testimony on plaintiff's behalf, from recollection, as to how much coal was shipped on various days from his mine in 1919 and 1920; and in refusing to permit defendants to show from the reports made by plaintiff to the Baltimore and Ohio what those actual shipments were.

22. The Court erred in refusing to admit in evidence plaintiff's daily and monthly reports for September, 1922, on which were based plaintiff's October mine rating.

23. The Court erred in admitting in evidence testimony of plaintiff that the Baltimore and Ohio from 1918 to 1924 issued various changes in their rules and regulations governing distribution of cars to coal mines, which evidence was designed to show that it was impossible for plaintiff to understand the requirements of the Baltimore and Ohio rules relating to the time to be reported to the railroad as consumed by the mine in producing the coal or on the tipple (for the purpose of rating the mine), which changes in the rules had to do with entirely different subject matters, as shown by the rules themselves introduced in evidence.

24. The Court erred in permitting plaintiff to offer in evidence the daily reports of Coalton and Mabie Mines and plaintiff's testimony that said reports showed that the West Virginia Coal & Coke Company had given in those reports, as the time spent on the tipple, the same number of [fol. 47] hours as was reported for the time spent in the mine producing coal, there having been no attempt to show that such was not the fact at those mines; and the Court further erred in not admitting testimony on behalf of defendants after said reports were received in evidence to show what was the rate of production per miner in those mines during the days covered by said reports.

25. The Court erred in refusing testimony on behalf of defendants by plaintiff's employees that on different occasions they heard plaintiff's time-clerk reporting by telephone from the mine to the Elkins office the hours spent in the mine or on the tipple on such days in producing the coal, and that the time so reported was about half of the actual time spent.

26. The said Court erred in refusing to charge the jury, in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 1, as follows:

"The Court instructs the jury that there is no evidence in the case legally sufficient to entitle the plaintiff to recover from the defendants, and their verdict must be for the defendants."

27. The Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 2, as follows:

"The Court instructs the jury that there is no evidence in the case legally sufficient to entitle the plaintiff to recover from the defendant, The Baltimore and Ohio Railroad Company, and their verdict must be for defendant, The Baltimore and Ohio Railroad Company."

28. The Court erred in refusing to charge the jury in accordance with defendant's prayer for an instruction, designated defendants' instruction No. 3 as follows:

"The Court instructs the jury that there is no evidence in the case legally sufficient to entitle the plaintiff to re-

[fol. 48] cover from the defendant, the Western Maryland Railway Company, and their verdict must be for defendant, the Western Maryland Railway Company."

29. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction designated defendants' instruction No. 4 as follows:

"The Court instructs the jury that the evidence in the case shows that the ratings accorded to plaintiff during the period covered by the petition, were inflated and excessive and therefore plaintiff can not recover."

30. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 5 as follows:

"The Court instructs the jury that from the evidence plaintiff's mine ratings were inflated and excessive during the period covered by the petition, and that defendant, The Baltimore and Ohio Railroad Company, was induced to fix said ratings as a result of plaintiff's understatement in the daily and monthly reports shown in evidence of the time spent in the tipple or in the mine in dumping the coal over the tipple, or in the mine in producing the coal shipped, as stated in said reports, and therefore plaintiff cannot recover and the verdict must be for the defendants."

31. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 6 as follows:

"The Court instructs the jury that if they find from the evidence that plaintiff's mine ratings were inflated and excessive during the period covered by the petition, and shall further find that defendant, The Baltimore and Ohio Railroad Company, was induced to fix said ratings as a result of plaintiff's understatement in the daily and monthly reports, mentioned in evidence, of the time spent on the tipple or in the mine in dumping the coal over the tipple, or in the [fol. 49] mine in producing the coal shipped, as stated, in said reports, the plaintiff cannot recover and their verdict must be for the defendants."

32. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' Instruction No. 7 as follows:

"The Court instructs the jury that under the rules of The Baltimore and Ohio Railroad Company governing the rating of coal mines and car distribution to such mines it was plaintiff's duty, in answering question AZ of the daily reports made to the Baltimore and Ohio Railroad Company, that is to say 'Total number of hours worked today (see paragraph "E") on the tipple', to report all of the time from the hour when the tipple started operation for the day until it ceased operation for the day without making any deduction for the time when the tipple was not in operation while awaiting arrival of coal from inside the mine; and in answering question BA of said daily reports, that is to say 'Total number of hours worked today (see paragraph "E") in the mine producing coal', it was plaintiff's duty to report all of the time from the hour when the mine operation started for the day until it ceased operation for the day, including such time as the miners remained in the mine placing props, laying track, and loading coal into mine cars after the tipple ceased working for the day, and also including the time spent while the mine was in operation in producing coal on days when no railroad cars were on hand for a subsequent day's loading into railroad cars."

33. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 8 as follows:

"The Court instructs the jury that it was plaintiff's duty, in stating the time spent on the tipple in dumping coal or in the mine in producing coal shipped as stated in the daily and monthly reports, to include all of the time spent while the mine was in operation in mining and loading said coal; [fol. 50] and the Court further instructs the jury that if they find from the evidence that some of the miners worked at night or at hours other than the usual working day, and when the mine was not in general operation, then it was plaintiff's duty to ascertain with reasonable certainty the amount of time so spent by such miners and to take such time into consideration and include a reasonable amount of

time therefor in the total time reported to the defendant, The Baltimore and Ohio Railroad Company, as having been spent in the mine in producing the coal for the various dates covered by the daily reports offered in evidence."

34. The said Court erred in refusing to charge the jury in accordance with defendant's prayer for an instruction, designated defendants' instruction No. 10 as follows:

"The Court instructs the jury that if they believe from the evidence in the case that plaintiff substantially understated the time spent on the tipple in dumping coal or the time when a substantial part of the pick miners were at work in producing coal reported to defendant, The Baltimore and Ohio Railroad Company, then plaintiff's mine ratings were inflated and excessive and plaintiff cannot recover."

35. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 11 as follows:

"The Court instructs the jury that if they believe from the evidence in the case more time was required in producing coal at plaintiff's mine than was required for dumping coal over the tipple, and that plaintiff reported in each of the daily reports offered in evidence the same time spent on the tipple as in the mine producing coal with the exception of the report for October 30, 1922, as to which day plaintiff reported one-half hour spent on the tipple and no time in producing the coal; and if the jury shall find from the evidence in the case that plaintiff reported only the tipple time for each day, except as above mentioned, instead of the [fol. 51] actual time spent by the day men and pick miners at producing coal for each day and also for a subsequent day's loading into railroad cars, the plaintiff did not comply with the rules of defendant, The Baltimore and Ohio Railroad Company, governing the rating of coal mines and car distribution to such mines in effect throughout the period covered by the petition and therefore by omitting to report all the time spent in producing the coal, plaintiff obtained an inflated mine rating and plaintiff cannot recover."

36. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designed defendants' instruction No. 12 as follows:

"The Court instructs the jury that the undisputed evidence in the case shows that plaintiff's mine ratings were fixed by the defendant, The Baltimore and Ohio Railroad Company, in accordance with its rules legally established upon the daily and monthly reports rendered by plaintiff to said Baltimore and Ohio Railroad Company and that if the jury shall find from the evidence that the time stated in the daily and monthly reports as having been spent in the mine in producing the coal shipped, as stated in said reports, was substantially less than the time actually spent in the mine in producing the coal, then plaintiff's mine ratings were inflated and plaintiff is not entitled to recover and their verdict must be for the defendants."

37. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 13 as follows:

"The Court instructs the jury that if they shall find from the evidence in the case that plaintiff's mine ratings were fixed by defendant, The Baltimore and Ohio Railroad Company, in accordance with its rules legally established upon the daily and monthly reports rendered by plaintiff to said Baltimore and Ohio Railroad Company, and if they shall further find from the evidence that the time stated in the daily and monthly reports as having been spent in [fol. 52] the mine in producing the coal shipped as stated in said reports was substantially less than the time actually spent in the mine in producing the coal, the plaintiff's mine ratings were inflated and plaintiff is not entitled to recover and their verdict must be for the defendants."

38. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 14 as follows:

"The Court instructs the jury that if they shall find from the evidence in the case that it was the practice at plaintiff's mine to stock up coal by loading the mine cars and getting the coal loose and ready for loading, for the next day's loading after the railroad cars on hand were

loaded, and that such time thereby consumed in stocking up coal was not reported in the daily and monthly reports to defendant, The Baltimore and Ohio Railroad Company, then such practice resulted in producing an inflated mine rating and plaintiff cannot recover."

39. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 15 as follows:

"The Court instructs the jury that if they shall find from the evidence in the case that plaintiff ordered either 94.1 railroad cars, as testified to by plaintiff, or 127.7 railroad cars, as testified to by defendants, fewer than his existing ratings entitled him to order from The Baltimore and Ohio Railroad, then this circumstance shall be taken into consideration by the jury in determining whether plaintiff's mine could have produced the tonnage claimed by plaintiff and if the jury find from the evidence that plaintiff's mine could not produce coal according to its rating, then plaintiff's mine rating was inflated and plaintiff cannot recover."

40. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 16 as follows

[fol. 53] "The Court instructs the jury that if they shall find from the evidence in the case that plaintiff's mine could not load as many as 10.2 railroad cars in October, 10.7 railroad cars in November and 11.3 railroad cars in December, in the year 1922, and 12.6 railroad cars in January, 12.7 railroad cars in February and 13.8 railroad cars in March, in the year 1923, all of said railroad cars having a capacity of fifty tons each, in a day of eight hours spent either on the tipple or in the mine producing coal, then plaintiff's mine rating was inflated and he cannot recover."

41. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 17 as follows:

"The Court instructs the jury that in determining the question whether plaintiff could or would have produced

and sold all of the coal which should have been loaded in the 818 cars which he claims he would have received from the defendant, the Western Maryland Railway Company, if he had been permitted to order cars exclusively from that defendant, they may take into consideration the fact that The Baltimore and Ohio Railroad Company had a materially lower percentage of car supply available than did the Western Maryland Railway Company and that under plaintiff's own admission in evidence he ordered 94.1 railroad cars, of fifty ton capacity, fewer from The Baltimore and Ohio Railroad Company than he could have ordered under his existing mine ratings."

42. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 18 as follows:

"The Court instructs the jury that there is no evidence in the case that plaintiff could have shipped more than fifty tons of coal in the cars of the defendant, Western Maryland Railway Company, and in computing plaintiff's damages, if any, the jury must disregard the evidence that plaintiff shipped 53.5 tons per car in the cars of defendant, [fol. 54] The Baltimore and Ohio Railroad Company."

43. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 19 as follows:

"The Court instructs the jury that even if the jury believe from the evidence that the car ratings of all or any mines of the West Virginia Coal and Coke Company were inflated and that such inflation was result of understatements in the daily and monthly reports of such other mines of the time consumed in dumping coal over their tipples, or in their mines in producing coal shipped, such inflated ratings of other mines would not excuse plaintiff in understating by his daily and monthly reports the time spent on his tipple in dumping coal or in his mine in producing coal, and if the jury believe from the evidence that by such understatements plaintiff procured an inflated mine rating from the defendant, The Baltimore and Ohio Railroad Company, the plaintiff has no right to recover and their verdict must be for the defendant."

44. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 20 as follows:

"The Court instructs the jury that the defendant Western Maryland Railway Company was in no way bound by the ratings accorded plaintiff's mine by the defendant Baltimore and Ohio Railroad Company during the period from October 17th, 1922, to April 30th, 1923, and inasmuch as plaintiff testified that he would have ordered cars only from the defendant Western Maryland Railway Company if he had been permitted to do so, the burden of proof is upon the plaintiff to show what mine ratings he would have been accorded by the defendant Western Maryland Railway Company; and there being no evidence in the case to show what such ratings would have been, there is no basis in the evidence upon which the jury can ascertain any dam- [fol. 55] ages for plaintiff and therefore its verdict should be for the defendants."

45. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 21 as follows:

"The Court instructs the jury that the defendant Western Maryland Railway Company was in no way bound by the ratings accorded plaintiff's mine by the defendant Baltimore and Ohio Railroad Company and if the jury are unable to determine from the evidence in the case what ratings plaintiff would have been accorded by the defendant Western Maryland Railway Company if he had been furnished railroad cars by said defendant during the period from October 14, 1922, to April 30, 1923, then there is no basis in the evidence upon which the jury can ascertain what damages the plaintiff suffered as a result of not receiving Western Maryland cars and their verdict must be for the defendants."

46. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 22 as follows:

"The Court instructs the jury that on the undisputed evidence in the case plaintiff's mine ratings were based entirely upon the daily and monthly reports made by plaintiff

to defendant, The Baltimore and Ohio Railroad Company; and the Court further instructs the jury that inasmuch as the facts pertaining to the time reported by plaintiff in his daily and monthly reports to The Baltimore and Ohio Railroad Company as having been spent in dumping coal over the tipple and in the mine in producing coal, were exclusively within the knowledge of the plaintiff, the burden of proof is upon him to establish that such time was correctly reported and if the jury believe from the evidence that the plaintiff has not shown by a preponderance of evidence that he did correctly report such time, then there is no evidence from which the jury can find that plaintiff's mine ratings were proper and their verdict must be for the defendants."

[fol. 56] 47. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 23 as follows:

"The Court instructs the jury that if they find for plaintiff any sum of damages, they shall not find, as part thereof, any interest thereon."

48. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 24, as follows:

"The Court instructs the jury that if they find for plaintiff any sum of damages, they shall not find as part thereof, any interest in excess of interest calculated at six (6) per cent from February 28, 1929.

Pennsylvania Railroad Co. vs. Minds, 244 Federal 53; 63 L. Ed. (U. S. 1039); 250 U. S. 368."

49. The said Court erred in refusing to charge the jury in accordance with defendants' prayer for an instruction, designated defendants' instruction No. 25 as follows:

"The Court instructs the jury that if they find for plaintiff any sum of damages, in no event can the jury allow interest at six (6) per cent on any sum in excess of $12,838.31, nor for any period prior to February 28, 1929.

Pennsylvania Railroad Co. vs. Minds, 244 Federal 53; 63 L. Ed. (U. S. 1039); 250 U. S. 368."

50. The said Court erred in charging the jury by modifying defendants' prayer for an instruction, designated defendants' instruction No. 6 by inserting therein the words "knowingly and falsely", thereupon giving to the jury in his charge said instructions as so modified by the court as follows:

"The Court instructs the jury that if they find from [fol. 57] the evidence that plaintiff's mine ratings were knowingly and falsely inflated and excessive during the period covered by the petition and shall further find that defendant, The Baltimore and Ohio Railroad Company, was induced to fix said ratings as a result of plaintiff's understatement in the daily and monthly reports, mentioned in evidence, of the time spent on the tipple or in the mine in dumping coal over the tipple or in the mine in producing the coal shipped, as stated in said reports, the plaintiff cannot recover and their verdict must be for the defendants."

51. The said Court erred in charging the jury by modifying defendants' prayer for an instruction, designated defendants' instruction No. 19 by inserting therein the words "falsely and knowingly" understating and by omitting therefrom the last clause thereof, and thereupon giving to the jury in his charge said instructions so modified by the court as follows:

"The Court instructs the jury that even if the jury believe from the evidence that the car ratings of all or any mines of the West Virginia Coal & Coke Company were inflated, and that such inflation was result of understatements in the daily and monthly reports of such other mines of the time consumed in dumping coal over their tipples or in their mines in producing coal shipped, such inflated ratings of other mines would not excuse plaintiff in falsely and knowingly understating by his daily and monthly reports the time spent on his tipple in dumping coal or in his mine in producing coal."

52. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 1 as follows:

"The Court instructs the jury that under the evidence in this case the plaintiff was entitled to service for the shipment of coal from his coal mine in question, from both the Baltimore and Ohio Railroad Company and the Western Maryland Railway Company, during the period from Oc-[fol. 58] tober 14, 1922, to April 1st, 1923, and as such he was entitled to order from either or both of said railroads a daily supply of coal cars up to the rating of his mine, as his judgment might dictate; the combined orders, however, not to exceed 100% of the rating of his mine, and it was the duty of said railroads to supply cars on said orders pro rata according to their available car supply; and you are further instructed that if you believe from the evidence in this case that the plaintiff did order cars from said railroads, or both of either thereof, in accordance with the rating of his mine, and that said railroads failed or refused to furnish cars under said order, pro rata according to the available car supply, then the defendants are liable for all damages, if any, sustained by plaintiff by reason of the failure to furnish said cars; and in fixing said damages the jury shall take into consideration the profits, if any, which plaintiff would have realized on coal which he could have sold and shipped in the cars not supplied, if the jury believe from the evidence that he could have sold and shipped said coal, and in addition thereto, the extra expense, if any, to which plaintiff was subjected in the mining of the coal, which he did mine, sell and ship, by reason of the failure to furnish said cars to which he may have been entitled; and that said damages, if any, so ascertained, would draw interest from the 1st day of April, 1923; and if the jury find from a preponderance of the evidence in this case that the plaintiff did sustain any such damages, then they shall calculate the interest at six per cent (6) on the said sum from the 1st day of April, 1923, up to the date of their verdict; and the total sum thus ascertained should be your verdict."

53. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 2 as follows:

"The Court instructs the jury that the plaintiff, as a matter of law, was under no obligation to accept or agree to a contract with the defendants that he be furnished at

his coal mine in question in this case, a car supply on the basis of 20% from the Baltimore and Ohio Railroad Company and 80% from the Western Maryland; but, that he [fol. 59] was entitled to have cars based upon his mine rating to be ordered by him from either or both railroads, as his judgment might dictate, the combined orders, however, not to exceed 100% of his mine rating, and he was entitled to receive on said orders his pro rata share of cars of the available car supply; and if the jury further believe from the evidence in this case, by a preponderance thereof, that plaintiff placed orders with the Western Maryland Railway Company for cars not to exceed the rating of his mine, and was refused cars by said Western Maryland Railway Company when they had cars available, and then placed said orders with the Baltimore and Ohio Railroad Company and received from said last name- company his pro rata share of cars according to its available car supply; but that if the said Western Maryland Railway Company had furnished cars pro rata, according to its available car supply, he would have received an additional number of cars; and if they further believe that plaintiff could have loaded and sold the amount of coal which could have been shipped in the said additional cars, then the defendants are liable to the plaintiff for such damages as resulted from such failure to furnish said cars; and under these circumstances plaintiff could not be charged, by way of an off-set against his damages, such profits as he could have made or such excess expenses as he could have saved had he agreed with said railroad companies to accept cars on said 20-80 basis.

And you are further instructed that notwithstanding the fact that the Interstate Commerce Commission, in making up its report of damages sustained by defendant, did allow as an off-set damages and expenses which would have been attributable to the cars which plaintiff would have received under the 20-80 agreement, yet you are instructed that the Interstate Commerce Commission in making said deduction, if you believe as aforesaid that the plaintiff did in fact place his orders with the Western Maryland Railway for the cars in question, was without any authority of law for making said deduction and the jury, under this state of -acts and circumstances as herein conditioned, should disregard any such off-sets as may have been allowed or made by the Interstate Commerce Commission."

[fol. 60] 54. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 3, as follows:

"The Court instructs the jury that under the evidence in this case the acts and practices of defendants in according Western Maryland service to the mines of the West Virginia Coal and Coke Company in conformity with the business of the said Company during the period from October 14, 1922, to April 1, 1923, while failing to accord such service to plaintiff's mine in conformity with his business during the same period, subjected plaintiff to undue and unreasonable prejudice and disadvantage in the matter of car supply; that during the said period plaintiff was entitled to place his orders for cars with either or both the Western Maryland or Baltimore and Ohio Railways as his judgment dictated, provided his total orders did not exceed one hundred per cent of the rating of his mine, and that, therefore, he was entitled to place orders for cars not in excess of one hundred per cent of the rating of his mine with the particular road having the larger supply of cars available for distribution, viz: the Western Maryland Railway, and that plaintiff was entitled to receive his pro rata share of the cars from said Western Maryland Railway in accordance with the supply of cars which the said railway had available for distribution."

55. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 4 as follows:

"The Court instructs the jury that during the period covered by this case the law required the defendant railroad corporations to maintain and apply just and reasonable ratings of the coal mines served by their respective lines; that the ratings fixed by the Baltimore and Ohio Railroad Company for plaintiff's mine are presumed to have been just and reasonable; that the said ratings of plaintiff's mine are binding upon and cannot be impeached by defendants for any reason whatsoever in this case, except upon [fol. 61] the ground that plaintiff knowingly and fraudulently furnished to the Baltimore and Ohio Railroad Com-

pany false reports for the purpose of obtaining an unlawful rating of his mine and that said reports, without the knowledge of that defendant that they were false, in fact secured to plaintiff an unjust an- unreasonable rating of his mine; that the burden of proof rests upon defendants to prove clearly by a preponderance of the evidence that plaintiff did knowingly and fraudulently furnish false reports which, without the knowledge of the defendants, resulted in giving plaintiff's mine an unjust and unreasonable rating."

56. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 7 as follows:

"The Court instructs the jury that the plaintiff, in applying the rules of the defendant railroad companies relative to the rating of his mine and the reports furnished by him pursuant to said rules, had the right to construe the terms 'Hours worked in the mine producing coal', and 'Hours worked', in a way which was capable of practicable application to this mine and fair and reasonable, and the further right to consider the custom and practice of other mines in the same general region on the same railroad and subject to the same rules, and if you further believe from the evidence in this case that plaintiff did so operate his mine and make his reports, then the rating of his mine as fixed by the Baltimore and Ohio Railroad Company is binding upon the parties."

57. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 10 as follows:

"The Court instructs the jury that under the tariffs and rules of defendants which were in effect during the period involved in this case, plaintiff was privileged to load the cars placed at his mine to a maximum of ten per cent above their marked capacity, and he would have been privileged to load the additional cars, if any, which should have been [fol. 62] placed for loading at his mine, to a maximum of ten per cent above their marked capacity, and you are fur-

ther instructed that the said tariffs and rules were published and maintained by defendants pursuant to a statute of the United States and were, and are, therefore binding upon the defendants in this case."

58. The said Court erred in charging the jury over the objection of defendants in accordance with plaintiff's prayer for an instruction, designated plaintiff's instruction No. 11 as follows:

"The Court instructs the jury that if you believe from the evidence that defendants failed or refused to furnish plaintiff with the cars to which he was entitled by virtue of the orders which he placed with the Western Maryland Railway, and that the cars to which he was entitled by virtue of said orders were greater in number than the cars which he was actually furnished, then the defendants are liable for any and all damages sustained by plaintiff as a result of his not receiving the said additional cars; and in computing the said damages, you shall take into consideration the profits, if any, which plaintiff could have realized on coal which he could have sold and shipped in the said additional cars, if you believe from the evidence that he could have sold and shipped said coal; and in addition thereto, the excess cost, if any, which plaintiff incurred in producing the coal which he did mine, sell and ship, as a result of his not receiving the said additional cars; and if you find from a preponderance of the evidence that the plaintiff did sustain any such damages, then you shall calculate interest at six per cent (6%) per annum from April 1, 1923, to the date of your verdict on the total amount of damages so ascertained, and the sum of the damages and interest shall be your verdict."

59. The said Court erred in that specific part of said Court's charge to the jury, which instructs the jury that they should find interest at 6% from April 1, 1923, up to the date of the verdict of the jury if they should find for plaintiff.

[fol. 63] 60. The Court erred in that specific part of said Court's charge to the jury which instructs the jury that if a majority of the jury were in favor of one party and a minority were in favor of the other party, that the minority should yield to the majority if they could conscientiously do so.

61. The Court erred in overruling defendants' motion to set aside the verdict, and in entering judgment for the plaintiff on said verdict.

Eugene S. Williams, Charles R. Webber, E. A. Bowers, John F. Brown, Counsel for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER—MOTION TO SIGN BILL OF EXCEPTIONS AND OBJECTIONS SUBMITTED TO COURT, ETC.—Filed and entered December 14, 1931

On this December 14th, 1931, came again the parties by their attorneys, and defendants, by counsel, moved the Court to sign and make part of the record herein their bills of exceptions which were exhibited and presented in Court to plaintiff's counsel on December 3rd, 1931, at which time objections were made thereto by plaintiff, and in support of said motion defendants filed the affidavit of John F. Brown and the affidavit of E. A. Bowers, of counsel for defendants, to which motion plaintiff, by counsel, objected in writing and filed affidavit of S. T. Spears; and the Court having heard argument of counsel, said motion and affidavits and said objections are submitted to the Court; and counsel for plaintiff hath leave to file brief or briefs herein on or before Saturday, December 19, 1931, and counsel for defendants hath leave to file additional briefs herein or before December 26, 1931.

Enter.

W. E. Baker, Judge.

[fol. 64] IN UNITED STATES DISTRICT COURT

OBJECTIONS TO SIGNING BILL OF EXCEPTIONS—Filed December 14, 1931

The plaintiff objects to the court signing any Bills of Exceptions in this action because the term of court at which the judgment in this action was rendered expired on the 16th day of November, 1931, and there is no standing rule

of the court extending the date beyond the adjournment of a term of court for the purpose of signing Bills of Exceptions, and no order was entered by the court during the said term extending the time beyond the expiration of said term within which to sign Bills of Exceptions, and no Bills of Exceptions were proposed or offered either to plaintiff or to the court for the purpose of being signed by the court until the 3rd day of December, 1931, and after the time had expired within which the court had jurisdiction to sign Bills of Exceptions, and therefore the court is without jurisdiction to sign any Bills of Exceptions in this action.

And plaintiff, by counsel, further objects to the transcript as made by K. T. Manning, Reporter, being filed as a part of the records in this cause because said transcript can only be made a part of the record by a Bill of Exceptions duly signed by the court and the time for the signing of the Bill of Exceptions has expired and had expired before said transcript was tendered for filing.

(Signed) George T. Bell, (Signed) S. T. Spears,
Attys. for Plaintiff.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN F. BROWN—Filed December 14, 1931

STATE OF WEST VIRGINIA,
County of Randolph, ss:

Affiant, being first duly sworn, says that he is an attorney at law practicing in the above Court, and was of counsel for defendants therein upon the trial of the above styled case, and was present at the conclusion of said trial on the day [fol. 65] that the verdict was rendered for the plaintiff and personally submitted on behalf of defendants the motion to set aside the verdict of the jury as contrary to the law and the evidence and as excessive, and after the trial judge had forthwith overruled said motion, he, affiant, immediately and publicly in Court, acting as counsel for defendants and on their behalf, directed Kemble T. Manning, who had been sworn as Court reporter in the case and who was present in Court, to proceed to transcribe the evidence taken on the trial and the proceedings had thereat, and thereupon an-

nounced publicly in Court that the defendants intended to appeal. And affiant further says that on more than one occasion, prior to November 16, 1931, he urged Reporter Manning to rush and complete said transcript.

John F. Brown, Affiant.

Taken, subscribed and sworn to before me this 11th day of December, 1931, as witness my hand and notarial seal. My commission expires Dec. 3rd, 1938. Hallie H. Hoefar, Notary Public. (L. S.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. A. BOWERS—Filed December 14, 1931

STATE OF WEST VIRGINIA,
County of Randolph, ss:

E. A. Bowers, being first duly sworn, says that he is one of counsel of record for defendants in above styled suit but was absent from the Court Room when the trial opened on July 22, 1931, but returned to the Court Room and the trial on the morning of July 24, 1931, and was there present continuously during the trial until after the argument of counsel, but was called away from the City of Elkins, at which place said trial occurred, and was absent at the time the Court delivered his charge and when the jury returned its verdict on August 7, 1931, and was discharged.

[fol. 66] Affiant further says that on returning to Elkins he learned no judgment had been entered on the verdict but that his associate, John F. Brown, of the City of Elkins, had directed the reporter, Kemble T. Manning, to transcribe the evidence and proceedings on the trial; that affiant, on August 10th, 1931, communicated with said Manning, repeating the direction to prepare the transcript of the proceedings on the trial urging him to speed the work, to which he replied that he had other transcripts of trials which occurred ahead of above mentioned trial but that he would forego his work of reporting in another court, then soon to begin, and would pursue the transcribing of this record as diligently as possible; that cost and charges for making said transcript were then discussed and the reporter was

made definitely to understand that the transcript was to be made and the work must be speedily begun, and the proper customary fees would be paid to him; that on August 18, 1931, affiant, after talking with Reporter Manning on the telephone respecting his work and being advised that he had not yet started it, wrote a letter to Reporter Manning (whose residence and office is at Elkins, West Virginia) in the following langauge:

"Western Maryland Railway Company

Elkins, West Virginia, August 18, 1931.

Mr. K. T. Manning, Court Reporter, Elkins, W. Va.

DEAR SIR:

Re Brady vs. B. & O. and W. M.

Confirming order which I think was heretofore given you, please be advised that the defendant Railroad Companies want only one carbon copy of the transcript. In making up this transcript we do not care to have you lengthen it by inserting arguments of counsel on exceptions and objections during the introduction of evidence. I understand Judge Baker doesn't expect you to insert these arguments.

[fol. 67] If you will tell us what forms of documents you want us to supply to you and the number thereof, I will send for them at once.

It is of the utmost importance that this transcript be prepared without any avoidable delay. If you will turn over to me from time to time, say each week, the carbon of the part that you have completed I will appreciate it and it will save us a lot of time and worry in preparing our assignments of error.

Yours truly, (Signed) E. A. Bowers, Gen'l Attorney for West Va.

EAB:HH."

Affiant further says that on August 11, 1931, Mr. S. T. Spears, of Elkins, one of counsel for plaintiff, submitted to affiant a form of judgment order which he proposed to ask should be entered on the verdict of the jury in this

case, wherein said Spears stated that he knew the defendants expected to appeal the case and further stated that he desired to present the judgment order to the Court within two or three days thereafter. Affiant reproduces the last aforesaid letter as follows:

"Law Offices of Sam T. Spears, Elkins, W. Va.

August 11, 1931.

E. A. Bowers, Esq., Elkins, West Virginia.

Dear Mr. Bowers: I enclose herewith copy of an order which I contemplate asking the judge to enter in the case of Brady vs. Railroad Companies. You will observe that I am leaving for the future consideration of the court the matter of attorneys' fee. Inasmuch as you expect to appeal this case I think the matter of attorneys' fee should wait until final decision in the higher court and the reservation in that respect was made for that purpose. Kindly [fol. 68] give the matter your attention and if the order does not meet with your approval let me know. I am sending a copy to Mr. Bell and as soon as I hear from him I will want to present the matter to the court, which will probably be in the next two or three days.

Yours very truly, (Signed) S. T. Spears.

STS/DC."

On August 17th Affiant appeared with said Spears before Honorable W. E. Baker, United States District Judge, Northern District of West Virginia at Elkins, who presided at said trial, in chambers, at which time said Spears presented aforesaid judgment order and affiant suggested some additions thereto by way of exceptions to the action of the Court in entering judgment for plaintiff, at which time there was discussed with said Judge the matter of allowance of attorneys' fee to be taxed as part of plaintiff's costs, as provided by the Federal statute in cases of this character, and the postponement of such allowance until after an appeal instead of the fixing of the same by the judgment order and in connection therewith it was definitely stated and understood that defendants intended to appeal, had ordered the transcript of the record from

the reporter, and in connection therewith affiant says he earnestly sought the indulgence and approval of counsel for plaintiff to an arrangement by which the entry of the judgment order should be delayed until such time as it would be apparent to affiant and the parties that the transcript could and would be completed by the reporter before expiration of the three month period for appeals and then and there said Spears indicated to the Court and to affiant that he anticipated there would be delay and more or less difficulty in obtaining the transcript from the reporter and that while he insisted upon a judgment in a reasonable time he would not object to a short delay in the entry of the judgment order; and thereupon affiant asserted that he was afraid of embarrassment resulting from delay of the reporter and wanted to avoid such embarrassment, being very fearful that it would occur, and said Spears stated to affiant that plaintiff's counsel had no intention to embarrass counsel for defendants and did [fol. 69] not want to see counsel for the defendants embarrassed in the matter of their appeal as a result of the failure of the reporter to prepare his transcript. At said conference, upon affiant emphasizing the probability of delay by the reporter and pointing out the importance and necessity of having the transcript before assignments of error and bills of exception could be prepared, affiant requested Judge Baker to phone to reporter Manning from his office and Judge Baker did immediately call said reporter Manning by telephone and stated to said Manning the necessity and importance that he should complete his transcript in this case and made it entirely plain to said Manning that he, as the Judge, expected him, Manning, as reporter, not to fail to get his transcript completed with diligence.

Affiant further says that aforesaid interview with Judge Baker terminated with the statement and understanding that entry of judgment order would be withheld until a few days before said Judge should be obliged to leave Elkins to begin his regular term at Martinsburg, West Virginia, early in September.

On Monday, September 7, 1931, affiant was informed by the Clerk of said Court that judgment order had been entered. Thereupon, affiant immediately communicated with

reporter Manning, again emphasizing to him the importance of completing the transcript, notifying him thereby that the period of limitation on appeals had begun to run and said reporter informed affiant he had made considerable progress on the transcript, which is similar information to that which had been given to affiant by said reporter over the period intervening between August 17th and September 7th, 1931.

Affiant further says that on September 10, 1931, he had an interview with said Spears, one of counsel for plaintiff, in respect to stay of execution on aforesaid judgment, at which interview it was definitely agreed by said Spears that no execution would be issued on said judgment during the statutory period for appeals and no stay-bond need be given, on the understanding of course that we intended to appeal. Affiant at said interview again repeated his fears that the reporter would not complete his transcript within the limited time and stated the necessity to have the transcript of evidence before intelligible assignments of error and before proper bills of exception could be prepared. [fol. 70] And said Spears expressed himself plainly to the effect he realized the situation and that we were at the mercy of the reporter and that he would do all he reasonably could to aid us in avoiding embarrassment. Affiant expressed his appreciation of this courtesy on the part of opposing counsel and in a large measure relied thereon because, having known and been intimately in professional contact with said Spears for upwards of thirty years, affiant had always known him to be strictly honorable in living up to the letter and spirit of his commitments. Affiant further says that on several later occasions he mentioned to said Spears that reporter Manning had not yet completed his transcript and affiant feared he had not really begun the preparation thereof and in the course of time intervening between September 10th and about mid-October, 1931, affiant learned from said Spears that he, Spears, had remonstrated with said reporter Manning on account of his delay in transcribing the record in this suit.

Affiant further says that the first portion of said reporter's transcript (consisting of carbon copy of 155 pages, the total of which consists of about 1,000 typewritten

pages) was delivered to him on October 27th and the preparation of the narrative of evidence and bills of exception based thereon was begun and diligently continued and progressed as succeeding pages were delivered, until the narrative and bills were completed on December 1st, 1931, which was the day on which the last pages of copy of said evidence were delivered to counsel for defendants. Affiant, prior to said date, had repeatedly urged said reporter to do his work and begin delivery of transcript and had expressed to him much dissatisfaction and impatience at his persistent delay; and after the delivery of aforesaid carbon copy of 155 pages and almost every day affiant continued urging said reporter to perform his duty and deliver carbon pages of transcript as completed. Becoming much exasperated by the dilatoriness of the reporter, on November 4, 1931 (no pages in addition to said carbon 155 having been yet delivered by the reporter) affiant called said Judge Baker by telephone at Wheeling, West Virginia (at which place said Judge was then sitting at his Court), earnestly requesting said Judge to do something to make the reporter complete his work and said Judge informed affiant that he would immediately write to said Manning and send [fol. 71] me copy of the letter; and affiant says that on or about November 6, 1931, he received a letter from said Judge enclosing carbon copy of his letter to said Manning, which copy of letter is reproduced as follows:

"Wheeling, November Fifth, 1931.

K. T. Manning, Esq., Elkins, West Virginia.

In re Brady vs. Railway Company

DEAR MANNING: Complaint has been made to me by counsel that you have not yet transcribed the record in the above styled cause.

More than two-thirds of the time has elapsed in which the defendants may prepare their record for appeal. It is useless to have evidence taken down if counsel are unable to get a transcript of the record.

I have just publicly announced that a reporting firm from Pittsburgh will not be allowed to report future cases in this court on account of their delay in getting up transcript. I

must insist upon your completing this record in the next few days.

Very truly yours, (Signed) W. E. Baker."

Affiant further says that up to November 9, 1931, despite repeated urgings by affiant and said Judge, said reporter had completed only 261 pages of said transcript and delivered carbon of same to affiant and on said day affiant received assurance from said reporter that the transcript would be completed and delivered to affiant first of following week. Affiant repeatedly many times emphasized to said reporter the high importance to defendants of having the transcript so that they might prepare their assignments of error and bills of exception. Practically from day to day thereafter said reporter did deliver to affiant carbon copy of pages of said transcript, sometimes forty to fifty, sometimes as many as one hundred pages and sometimes as few [fol. 72] as fifteen to thirty pages, until finally, on November 30, 1931, said reporter delivered to affiant's office carbon copy of all of the pages of transcript of evidence taken on said trial and thereafter completed transcribing his notes of the proceedings in respect to the Court's Charge and not until December 3, 1931, after four o'clock P. M., did said reporter certify and deliver his transcript to the Clerk of said Court and deliver to affiant copy thereof, complete.

Affiant further says that as rapidly as copies of pages of said transcript came into the hands of counsel for defendants, they pursued their work of narrating the evidence, preparing their assignments of error and their bills of exceptions but it was wholly impossible to complete said assignments of error and bills of exception and the same were not completed, on account of the delay in delivery of said transcript, until late on December 2nd, 1931, and on December 3rd, 1931, the same were submitted to the Court in connection with the submission of petition for appeal and the entry of an order allowing said appeal and fixing the amount of required bond.

Affiant further says that the trial of this case progressed continuously, each Court day, from July 22nd, 1931, to August 4, 1931, inclusive, introducing evidence of witnesses; that it was proper and necessary for convenience of the parties and the Court, in a case of this size and importance as is the custom in said Court, to have the evidence of wit-

nesses taken down in shorthand and later, after trial ended, transcribed into typewriting, as was done; and it was necessary in this case that defendants should have the evidence transcribed by the reporter to enable their counsel to prepare assignments of error and bills of exception as there were many exceptions to introduction and refusal to permit introduction of oral and documentary evidence.

E. A. Bowers, Affiant.

Taken, subscribed and sworn to before me this 11th day of December, 1931, as witness my hand and notarial seal. My commission expires Dec. 3rd, 1938. Hallie H. Hoefar, Notary Public. (Notarial Seal.)

[fol. 73] In United States District Court

Affidavit of S. T. Spears—Filed December 14, 1931

State of West Virginia,
County of Randolph, ss:

S. T. Spears, being first duly sworn, says that he is one of counsel for plaintiff in the above styled cause and is the S. T. Spears referred to in the affidavit of E. A. Bowers tendered in this case on the 14th day of December, 1931. Affiant says that he has no recollection of Mr. Bowers on any occasion referring especially to the matter of having signed Bills of Exceptions in this case. It is true that Mr. Bowers was concerned about being able to get the transcript of the evidence in time to prepare the Assignments of Error necessary before filing their petition for an appeal.

That with respect to the averments of the affidavit of the said Bowers to the effect that affiant remonstrated with reporter Manning on account of his delay in transcribing the record, affiant says that owing to the remarks of Mr. Bowers made at the time of the conference with the Honorable W. E. Baker when the judgment order was presented, affiant did then or a very few days thereafter see Mr. Manning and advised Mr. Manning that Mr. Bowers seemed to be exercised and in fact out of humor with the reporter and feared that he would not get the transcript in time for de-

fendants to prepare their Assignments of Error and petition for appeal and affiant did specifically state to Mr. Manning that as counsel for plaintiff affiant wanted him to go on and get up this transcript without delay. So far as affiant can now recall he never mentioned the matter to Mr. Manning again until after the question of the right of defendants to have Bills of Exceptions signed, arose.

Affiant further says that the only time that he discussed with Mr. Manning the matter of said transcript in connection with the Bills of Exceptions, was after the said term of court had adjourned and that Mr. Manning on that occasion informed affiant that he had understood all along from counsel for defendants that he had until December 4th, 1931, within which to deliver this transcript and that he did deliver the same before that date. That while he [fol. 74] was transcribing said evidence he arranged with the stenographer in Mr. Bowers' office to correct the same, for which services he gave an order on defendants to pay therefor, and that the copy of the evidence in the case was delivered to Mr. Bowers from day to day as the same was being transcribed.

S. T. Spears, Affiant.

Taken, sworn to and subscribed before me this 14th day of December, 1931. My commission expires on the 14th day of December, 19—. Claude W. Maxwell, Notary Public. (L. S.)

In United States District Court

Opinion—Filed February 11, 1932

This case was tried at the June term 1931 of this Court held in Elkins and a verdict rendered on August 7.

A motion was made to set aside the verdict, which the Court promptly overruled. For the purpose of allowing the court reporter ample time in which to get up the transcript of the record, and at the request of counsel for defendants, the judgment order was not entered at that time. On September 5, 1931, counsel for plaintiff and defendants appeared in Court, plaintiff's counsel asking that the judgment order be entered. Counsel for defendants stating

they could not ask further delay, the judgment order was entered on the 5th day of September, 1931, this still being within the June term.

Under standing rule No. 22 of the Court, the June term expired on November 16, 1931, which rule reads as follows:

"The adjournment of court at any time during any stated term shall not be deemed a final adjournment of the term; but such term shall continue for the general transaction of [fol. 75] business until the commencement of the next stated term at that place of holding court; and the court shall, to that end, pending the absence of the judge, stand and be deemed adjourned from day to day without formal order.

Upon any day during the continuance of such term on which the clerk shall receive any order, judgment or decree transmitted by the judge for entry, he shall open the court for the transaction of business and enter such order, judgment or decree upon the proper order book."

Rule 23 of Rules of Prac. District Court Northern Dist. of W. Va.

There is no standing rule of this Court in any way attempting to extend a term for the purpose of signing bills of exceptions. No order was entered during the June term and no order was requested during that term for an extension of time beyond the term within which to sign bills of exceptions.

On November 16, 1931, the June term of the Court expired; on December 3, the defendants presented, for the first time, proposed bill of exceptions and gave notice to counsel for plaintiff that on December 14 a motion would be made to the Court to have the bill of exceptions signed. Upon presentation of said bill of exceptions plaintiff objected to said motion on the ground that the time had expired in which bill of exceptions could be signed and that the Court had lost jurisdiction of the case for that purpose. At the same time (December 3) a transcript of the evidence and proceedings at the trial was tendered and plaintiff by counsel also objected to the filing of said transcript because the time had expired within which bill of exceptions could be signed by the judge and the transcript could not be made a part of the record except by lawful bill of exceptions.

The Questions Presented

The questions now presented is whether or not the Court has lost jurisdiction in this case for the allowing of bill of exceptions.

[fol. 76] Time for Presentation and Allowance of Bill of Exceptions

"A bill of exceptions cannot be considered by an appellate court unless it was duly presented to and allowed by the trial judge during the term at which the trial was had or within the time as extended by an order made during such term; or, where there is a rule of court on the subject, during the time so fixed or an extension granted before its expiration."

Oxford & Coast Line R. Co. vs. Union Bank, 153 Fed. 723 (4 C. C. A.).

Yellow Poplar Lumber Co. vs. Chapman, 74 Fed. 448 (4th C. C. A.).

The bill of exceptions must therefore be prepared and settled during the term at which the judgment is entered or during the time provided for in any order made by the judge during the term, extending the time beyond the term. A district judge is without authority to sign a bill of exceptions after the term and after cause has been removed to the appellate court unless the time has been previously extended.

Yellow Poplar Lumber Co. vs. Chapman, 74 Fed. 444, and cases cited. (4 C. C. A.)

Greyerbiehl vs. Hughes Elec. Co., 294 Fed. 802 and cases cited. (8 C. C. A.)

U. S. vs. Meadows, 29 Fed. (2) 739 (8 C. C. A.).

U. S. Todar, 41 Fed. (2) 146 (7 C. C. A.).

U. S. vs. Seale, 45 Fed. (2) 394 (5 C. C. A.).

Hughes Fed. Proc., Vol. 6, page 420, Sec. 3888.

Enc. Fed. Proc., Vol. 6, page 103, Sec. 2724.

Dobey on Fed. Proc., Sec. 159, page- 617 to 619.

Claude M. Dean Address before W. Va. Bar Assn. Sept. 10, 1929, page 7 et seq.

Whatever doubt there may have been as to the time within which bill of exceptions may be settled and signed

is clearly set forth by the Supreme Court in the case of Exporters vs. Butterworth-Judson Co., 258 U. S. 365, 368, wherein the Supreme Court holds:

[fol. 77] "In the recent case of O'Connell vs. United States, 253 U. S. 142, 146, we affirmed the doctrine announced in Mich. Ins. Bank vs. Eldred, 143 U. S. 293, 298, 'By the uniform course of decision no exceptions to the rulings at the trial can be considered by this court unless they were taken at the trial and were embodied in a formal bill of exceptions presented to the judge at the same term or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented or to alter or amend a bill of exceptions already allowed and filed, is at an end.' And applying this rule we held the bill of exceptions filed by the trial judge after the expiration of the time allowed by the rule of the court, was not part of the record.

"In the present case the term as extended had expired before any action concerning the bill of exceptions was taken by either court or counsel. In such circumstances the court had no power to approve it unless this could be conferred by mere consent of counsel. This they could not do. Consent of the parties cannot give jurisdiction to courts of the United States. Pittsburg C. & St. L. R. Co. vs. Ramsey, 22 Wall. 322, 327. The policy of the law requires that litigation be terminated within a reasonable time and not protracted at the mere option of the parties. See U. S. vs. Mayer, 235 U. S. 55, 70. We think the better rule, and the one supported by former opinions of this court, requires that bills of exceptions shall be signed before the trial court loses jurisdiction of the case by expiration of the term, or such time thereafter as may have been duly prescribed."

It is contended by defendants that the Court has power to sign this bill of exceptions on two grounds:

(1) That the facts of this case present "extraordinary circumstances" which take it out of the rule requiring the bill of exceptions to be signed within the judgment term or [fol. 78] within a time extended by an order of the Court entered during the judgment term.

(2) That under standing Rule 14 of this Court, this is a matter pending at the close of the term not disposed of, and thereby stood continued until the next term.

I have carefully considered the brief of defendants on the question of extraordinary circumstances. There were no extraordinary circumstances in this case. Had the presiding judge been out of the district or, for any reason counsel for defendants could not reach him, then this question would have been present. The judge of the Court returned to his home in Elkins on Saturday, November 14; was well, and in his office on Saturday evening the 14th, Sunday the 15th, and Monday the 16th—all before the term expired where he could have been seen at any time had counsel so desired and obtained an order extending the time for the preparation of the bill of exceptions. In case the Court was ill, or absent at the very end of the time limit so that presentation could not have been made to him personally of the bill of exceptions or an order extending the time, this doubtless would be considered extraordinary circumstances. As indicated in the Butterworth case, as it is construed by the Circuit Courts, exceptions are extremely limited and in no event can possibly intervene if they result from the acts of the parties or their counsel. It seems the Supreme Court of the United States practically eliminates the doctrine of extraordinary circumstances; at least it so limited the application of that principle that it could have no application under the circumstances disclosed in this case. Since the decision of the Butterworth case, Federal Courts have uniformly held that failure to secure timely bills of exceptions is fatal if the failure is, in any way, the fault of the parties or their counsel.

As was said by the Court in the case of Farm Mortgage & Loan Co. vs. Willett in the decision of the District Court, Western Division of New York, reported 285 Fed. 42, in which the Court quotes from the case of Gleckstein vs. U. S., 215 Fed. 90 (C. C. A.), as follows:

[fol. 79] "The extraordinary circumstances mentioned in the Supreme Court cases which justify the signing of bills of exceptions after the term has expired, relate to circumstances which caused the delay and cannot be said to include negligence of the party or the importance or difficulty of the questions involved."

Inability of court reporter to deliver the transcript of record until expiration of term was insufficient to excuse delay of defendants in asking for an extension of time, within the term, to prepare their bill of exceptions. Sprague vs. Chicago B. & Q. R. Co., 17 Fed. (2) 768. Hence, I conclude no extraordinary circumstances in this case intervened.

Does Rule 14 Apply?

The only part of Rule 14 of this Court that could possibly have any bearing on this case is the last paragraph thereof, as follows:

"All cases and matters pending at the close of a term and not otherwise disposed of, shall stand continued as of course to the next term without formal order."

It is conceded that this could not be a cause pending but it is argued that it is a matter pending. In support of this position defendants say they gave notice of their intention to appeal this case. The only possible basis for this contention is that when the trial court overruled the motion to set aside the verdict and grant a new trial, counsel for defendants stated they intended to appeal the case and the reporter was requested to make up the transcript; that from time to time statements were made by defendants that they intended to appeal the case.

It is obvious that Rule 14 can have no application to the signing of bills of exceptions. If by any stretch of the imagination bills of exceptions could be included under this rule, there never would be a time when the right to have bills of exceptions signed and filed would expire.

The question as to whether or not mere statement by counsel for a party of an intention to appeal a case, being a matter pending, is settled by our Circuit Court of Appeals (4th) in the case of Osborne vs. U. S., 50 Fed. (2) 812. [fol. 80] That was a case where the appeal was not taken

until after the expiration of the three-months period, but, as an excuse therefor, it was contended that the appellant gave notice of an appeal before the three-months period had expired, and the Court says:

"Aside from this a notice of appeal is not sufficient. The act of Congress (U. S. Code Title 28 Sec. 230) requires that an application must be made for the appeal. While the courts may be liberal in construing that word, yet they are not at liberty to disregard its reasonable meaning which in this usage necessarily carries the element of request. * * *

"The result is that under the act as amended appeals cannot be taken by notice, but there must be an application therefor in accordance with the rules covering appeals."

Counsel for defendants in their briefs say that the "effort" was pending. The claim that making the announcement that defendants intended to take an appeal makes it a matter pending, is completely refuted in the Osborne case (supra). There was no request of any kind or character made to this Court prior to the time it lost jurisdiction for extension of time for the purpose of signing bill of exceptions. There was nothing pending before this Court on that question. Defendants were at liberty at any time to abandon their announced intention to appeal. They were not required to get the consent of the Court to do that. There was nothing for the Court to pass on with respect to that matter. The granting of an appeal goes as a matter of course and a matter of right.

Counsel for defendants define the word "pending" as a "matter undecided." There can be nothing decided or undecided by a Court until something is before the Court for its decision. The question of signing this bill of exceptions was not before the Court until December 3, 1931, and it had already lost jurisdiction of the matter on November 16, 1931.

The facts in this case present no "extraordinary circumstances" which take it out of the rule requiring that bills of exceptions be signed within the judgment term or within a [fol. 81] time extended by an order of the Court entered during the judgment term.

Under standing Rule 14 of this Court there was no matter pending before the Court at the close of the term and

undisposed of. The simple, plain fact is that defendants and their counsel's oversight, and not the reporter's dereliction, was the proximate cause of this whole trouble. When confronted with matters involving the default of parties or their counsel, the courts of the United States, from the Supreme Court down, hold that this is no excuse. In the case of Witte vs. Franklin Fire Ins. Co. of Phila., 46 Fed. (2) 894, the 8th C. C. A. under date of February 14, 1931, says:

"It is regrettable that, on account of neglect of counsel, cases cannot be heard on their merits."

As stated in the case of U. S. vs. Stephanidis et al., 46 Fed. (2) 691, notwithstanding it involves a judgment of over one hundred thirty-six thousand dollars:

"If plaintiff had been careful to observe the rules in regard to obtaining an extension of the term, there would have been no difficulty even in this regard."

The law is plainly against the contention of the defendants on the facts here presented. The Court has no right or authority to sign and certify the bill of exceptions asked; hence, it declines to do so.

W. E. Baker, Judge.

Feb. 11, 1932.

In United States District Court

Order—Court's Refusal to Allow Bill of Exceptions—Filed and entered Feb. 19, 1932

This 19th day of February, 1932, at Elkins in said District, came the parties hereto by their attorneys, and the Court having maturely considered the defendants' bill of exceptions lodged in the Clerk's office of this Court on December 3, 1931, and the written objection of the plaintiff to the signing of said bill of exceptions filed on December 14, 1931, and, for reasons appearing in a written opinion [fol. 82] (filed herein on February 11, 1932, and now ordered to be and made a part of the record in this case), being of opinion that the Court was without jurisdiction to sign said bill of exceptions at the time the same was lodged,

and now is without such jurisdiction, the Court doth therefore sustain said objection of the plaintiff and doth refuse to sign, or make a part of the record herein, said bill of exceptions; to which action of the Court in sustain-g said objection and refusing to sign said bill of exceptions, the defendants except.

Enter.

W. E. Baker, Judge.

IN UNITED STATES DISTRICT COURT

MEMORANDUM UNDER SEC. 7 OF RULE 14 OF C. C. A.

(1) Petition for appeal filed the 3rd day of December, 1931.

(2) Order allowing appeal filed and entered the 3rd day of December, 1931.

(3) Appeal Bond: Approved and filed on the 4th day of December, 1931.
Penalty $75,000.00.
Obligors: Baltimore and Ohio Railroad Company, Western Maryland Railway Company, United States Fidelity & Guaranty Company.
Conditioned for judgment, damages and costs.

(4) Citation. Dated December 4, 1931.
Served December 4, 1931.
Filed December 7, 1931.

(5) Order extending time for filing transcript entered on January 6, 1932.

[fol. 83] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed Feb. 27, 1932

To A. C. Merrill, Esquire, clerk of said court:

The undersigned defendants in above styled suit direct that you please prepare and certify a transcript of the record thereof, as now constituted, for appeal to the United

States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, including therein the following:

1. Plaintiff's petition filed February 6, 1930, accompanied by Exhibits A and B (attached to the petition as printed documents), accompanied also by order of the Interstate Commerce Commission dated February 28, 1929.

2. Return of service of above petition on the two defendants The Baltimore & Ohio Railroad Company and Western Maryland Railway Company.

3. Appearance by counsel for defendants, March 10, 1930.

4. Demurrer filed on behalf of The Baltimore & Ohio Railroad Company.

5. Demurrer filed on behalf of Western Maryland Railway Company.

6. Demurrer assigning grounds, filed on behalf of The Baltimore & Ohio Railroad Company.

7. Demurrer assigning grounds, filed on behalf of Western Maryland Railway Company.

8. General issue plea filed on behalf of defendant The Baltimore & Ohio Railroad Company.

9. General Issue plea filed on behalf of defendant Western — Railway Company.

[fol. 84] 10. Order overruling demurrers entered July 14, 1931.

11. Order bringing on suit for trial swearing reporter, jury, etc., entered July 22, 1931.

12. (Insert any Court minutes entered from day to day during the progress of the trial if they show anything other than the fact that the case continued on trial.)

13. Order entering verdict, etc., entered August 7, 1931.

14. Order entering judgment, September 5, 1931.

15. Defendants' notice and service thereof, that their bills of exception, etc., will be presented on December 3, 1931, filed December 2, 1931.

16. Defendants' assignments of error filed with petition for appeal, December 3, 1931.

17. Order entered December 14, 1931, taking time to consider matter of bills of exception.

18. Written objection filed by counsel for plaintiff, filed December 14, 1931.

19. Affidavit of John F. Brown, filed December 14, 1931.

20. Affidavit of E. A. Bowers, filed December 14, 1931.
21. Affidavit of S. T. Spears, filed December 14, 1931.
22. Order entered January 6, 1932, extending time for filing transcript in Court of Appeals.
23. Court order of February 19, 1932.
24. Court's opinion, filed February 11, 1932.
[fol. 85] 25. Memorandum required by Article 7, Rule 14 of the Circuit Court of Appeals, Fourth Circuit.
26. This præcipe with stipulations of counsel for parties thereto appended.

Dated this February 27th, 1932.

Eugene S. Williams, Charles R. Webber, E. A. Bowers, John F. Brown, Attorneys for Defendants, The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation.

In United States District Court

Stipulation as to Make-up of Record and Printing Same

On this February 27, 1930, the undersigned parties to the above entitled suit, on appeal to the United States Circuit Court of Appeals of the Fourth Circuit, by their attorneys of record, stipulate pursuant to Section 3, Rule 14 of said United States Circuit Court of Appeals for the Fourth Circuit, that the record of said suit on appeal, as the same now appears in the records of the United States District Court for the Northern District of West Virginia at Elkins, in conformity with said Section 3 of said Rule 14, be made up as directed by the foregoing præcipe.

It is further stipulated that said record when so made up, certified and transmitted to the Clerk of said United States Circuit Court of Appeals for the Fourth Circuit, shall be printed in accordance with Rule 23 of said Court.

But said defendants and appellants The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, without limiting the effectiveness of the foregoing stipulation, save to themselves the right, if found to exist, hereafter to cause to be inserted in and made part of said record, in accordance with the rules and practice

of said United States Circuit Court of Appeals, bills of ex-
[fol. 86] ception, if any, which may be settled, sealed and save- to them.

Dated this February 27, 1932.

The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation, Defendants, by Eugene S. Williams, Charles R. Webber, E. A. Bowers, John F. Brown, Their Attorneys of Record. A. Spates Brady, Plaintiff, by George T. Bell, His Attorney of Record.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 87] In United States Circuit Court of Appeals for the Fourth Circuit

No. 3283

The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation, Appellants,

versus

A. Spates Brady, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Elkins

Docket Entries

March 11, 1932, the transcript of record is filed and the cause docketed

Same day, the original petition for appeal, order allowing appeal, appeal bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, order extending the time to and including the 1st day of April, 1932, within which to file the transcript of record in this Court, together with certificate of Clerk of District Court and certified copy of said order, are filed.

Same day, the appearance of E. A. Bowers is entered for the appellants.

March 14, 1932, the appearance of George T. Bell is entered for the appellee.

March 16, 1932, the appearance of Samuel T. Spears is entered for the appellee.

[fol. 88] March 17, 1932, the appearance of George M. Hoffheimer is entered for the appellants.

March 19, 1932, the appearance of Eugene S. Williams and William C. Purnell is entered for the appellants.

March 31, 1932, the appearance of Charles R. Webber is entered for the appellants.

Same day, twenty-five copies of the printed record are filed.

June 9, 1932, notice of and motion of appellants for a continuance is filed. Service accepted by counsel for the appellee.

June 9, 1932 (June term, 1932), cause argued on motion of appellants for a continuance before Parker, Northcott, and Soper, Circuit Judges, and submitted.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING MOTION TO CONTINUE AND AS TO APPELLANTS' REPLY BRIEF—Filed and entered June 9, 1932

Upon consideration of the motion of appellants for a continuance of the above entitled cause, and the argument of counsel thereupon had as well in support of as against the same,

It is now here ordered by this court that said motion be, and the same is hereby, denied.

It is further ordered that the time within which the appellants may file a reply brief be, and the same is hereby, extended to and including June 14, 1932.

June 9, 1932.

John J. Parker, Senior Circuit Judge

[fol. 89] In United States Circuit Court of Appeals

Argument of Cause

June 15, 1932 (June term, 1932), cause came on to be heard before Parker, Northcott, and Soper, Circuit Judges, and is argued by counsel and submitted.

United States Circuit Court of Appeals, Fourth Circuit

No. 3283

The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation, Appellants,

versus

A. Spates Brady, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Elkins

(Argued June 15, 1932. Decided October 3, 1932)

Before Parker, Northcott, and Soper, Circuit Judges

William C. Purnell and George M. Hoffheimer (Charles R. Webber, E. A. Bowers and Eugene S. Williams on brief) for appellants, and George T. Bell and Samuel T. Spears for appellee.

Opinion—Filed October 3, 1932

[fol. 90] Parker, Circuit Judge:

This is an appeal in an action instituted pursuant to Section 16(2) of the Interstate Commerce Act as amended (49 U. S. C. A. 16(2)) to recover damages sustained by the plaintiff, A. Spates Brady, as a result of the failure and refusal of the defendants, the Baltimore and Ohio Railroad Company and the Western Maryland Railway Company, to furnish to plaintiff coal cars in which to ship the product of his coal mine. Prior to the institu-

tion of the action plaintiff applied for relief to the Interstate Commerce Commission under Section 9 of the act; and the Commisison found the acts and practices complained of to be discriminatory and unduly prejudicial and retained the cause for the purpose of assessing his damages. Upon a later hearing it found that complainant had sustained damage as a result of the wrongful conduct of defendants in the sum of $57,735.11, but that he might have reduced this damage to $12,838.31 by accepting an offer of defendants relating to the furnishing of cars and entered a reparation order for the latter amount. The defendants refused to pay even this amount and plaintiff filed his petition in the District Court under Section 16(2) of the act, asking that he have judgment for the full damages which he had sustained, including not only the amount of the reparation order, but also the amount by which his damages had been diminished under the holding of the Commission as to his duty to reduce damages, contending that this holding was unwarranted by the facts and was beyond the power of the Commission.

There was a verdict and judgment for the plaintiff for the sum of $63,048.60 with interest from August 7, 1931, the date of the verdict; and defendants have appealed. The record contains no bill of exceptions. See Baltimore & Ohio Railway Co. et al. v. Baker (C. C. A. 4th), 58 Fed. (2d) 627. Consequently the only assignments of error which we may consider are those which relate to the record proper. The question which these raise is whether the judgment in favor of the plaintiff is supported by the petition. U. S. v. Archibald McNeil & Sons, 267 U. S. 302; Thornton v. National City Bank, (C. C. A. 2d) 45 Fed. (2d) 127, 129.

[fol. 91] The petition alleges that between October 14, 1922, and April 1, 1923, plaintiff owned and operated a coal mine on the Coalton branch of the Baltimore and Ohio Railroad in proximity to coal mines of the West Virginia Coal & Coke Company, a competitor of plaintiff, on the same branch; that some time prior to October 14, 1922, the Western Maryland Railway Company was granted trackage rights over this branch to the Coal & Coke Company's mines under an agreement which was in effect until April 1, 1923; that these trackage rights were exer-

cised throughout the period between said dates by the Western Maryland, which published and had in effect during the period schedules naming rates for the transportation of coal from the mines of the Coal & Coke Company to interstate points on its lines and the lines of numerous connecting railroads; that the effect of the trackage rights granted the Western Maryland was to give to the mine of plaintiff the status of a mine served by two lines of railroad; that during the period in question a car shortage existed and the effect of the trackage agreement was to give plaintiff the right to order his allotment of cars and ship his coal via either or both of the lines as his judgment might dictate; that this right was denied by the defendants, although they daily honored the orders for cars of his competitor; that throughout the period plaintiff filed written orders for cars with the Western Maryland, which, except in one instance, refused to place cars for loading at his mine, whereupon he filed orders with the Baltimore & Ohio; that the discriminatory acts and practices of the defendants in refusing to furnish cars to plaintiff in accordance with his right were unjust and unduly prejudicial and resulted in great loss and damage to him; that the Western Maryland had a better supply of cars available for distribution and, if that road had honored his daily requisitions for cars, he would have been entitled to receive during the period 818.1 cars, which he could have loaded with an average of 53.55 tons of coal; that he actually received only 372.8 cars (the Commission in its report attached to the petition found that only 5 of these were furnished by the Western Maryland and the remainder by the B. & O.); that the state of the market was such that he could have sold the entire output of his mine at the same aver- [fol. 92] age price as the coal actually produced; that if he had been furnished the cars to when he was entitled he could and would have loaded them with coal and sold same at a profit; and that, as a result of the unlawful acts and practices of defendants, he lost profits on the coal that he would otherwise have sold, and suffered an increase in cost of producing the coal actually mined and sold, amounting in all to $57,735.11, for which amount, with interest from April 1, 1923, he was entitled to judgment against defendants.

The petition further alleges that in October, 1923, the plaintiff filed with the Commission a complaint against the defendants alleging that the refusal to furnish him with cars as alleged was in violation of the Interstate Commerce Act as amended and praying an award of reparation for the damages sustained; that the Commission found that plaintiff should have been permitted to divide his orders for cars to the defendants in such divisions of 100 per cent of the rating of his mine as his judgment dictated, that cars should have been furnished in conformity with the supply of cars available on the respective roads, and that the acts and practices of defendants resulted in undue prejudice to plaintiff; that the Commission then set the case down for further hearing on the question of damages and upon such hearing found the excess mining costs and lost profits of plaintiff amounted to $57,735.11, as claimed, but held that in computing damages this amount should be reduced by the amount by which the loss would have been mitigated if plaintiff had accepted an offer of defendants to furnish his quota of cars on the basis of 80 per cent by the Western Maryland and 20 per cent by the B. & O. and also by the amount attributable to the estimated excess loading of the cars, as same had a rated capacity of only 50 tons per car; that the Commission made revised calculations based upon these mitigation of loss and average loading findings and arrived at the sum of $12,838.31, for which a reparation order in favor of plaintiff was entered; that a copy of the reparation order was served upon defendants but that they had failed and refused to observe the order or make the payment therein required; that the mitigation of loss finding and the average loading finding, [fol. 93] as a result of which the damages sustained by plaintiff were reduced in the order of the Commission, were erroneous as a matter of law and were beyond the power of the Commission; and that plaintiff was entitled to judgment not only for the amount of the reparation order and interest, but also for such additional sum as would include the full damages which he had sustained.

The two reports and the reparation order of the Commission were attached as exhibits to the petition. The first report deals with the administrative questions as to whether a mine located on a single line of railway is entitled to rating as a two-road mine because of a trackage

agreement giving another line of railway access to the mines of a competitor, and as to whether a refusal to accord such mine the status of a two-road mine with right to order its full quota of cars from either road should be held discriminatory and prejudicial where it has been offered cars in the same proportion that they are furnished to its competitor. The Commission found the facts on all material matters to be virtually as alleged in the petition and answered both questions in the affirmative. The following quotations from the report of the Commission (112 I. C. C. 244) will show the nature of the administrative questions decided and the action of the Commission thereon:

"Defendants contend that a joint-mine status was not conferred upon the mines of the coal company, because of an understanding which they had with the coal company to the effect that its mines were not permitted to order cars in excess of 80 per cent and 20 per cent of their rating from the Maryland and B. & O., respectively. * * * In his complaint complainant prays, in part, that defendants be required to accord to his mine treatment in service, cars, and rates to his mine similar to that accorded the mines of the coal company. Defendants contend that complainant was offered the same arrangement but he declined and cannot, therefore, be heard to complain. Whether or not this is true and whether or not similar service was in fact offered complainant depends upon surrounding circumstances.

* * * * * * *

[fol. 94] "It is clear from the above and other evidence of record that the arrangement whereby the coal company's car supply would be furnished by the Maryland and B. & O., respectively, in the proportion of 80 and 20 per cent was adapted to the needs of the coal company based upon their past shipments. It is also clear that the arrangement was the result of conference and agreement with the president of the coal company. Similar consideration was not given complainant, but he was advised that cars would be supplied by both carriers only in the proportion of 80 and 20 per cent, as was done with the coal company. Can it then be said that the complainant was not subjected to undue disadvantage?

* * * * * * *

"It is well established that a mine served by two roads enjoys advantages not possessed by a mine served by only one road. The reasonable enjoyment of these advantages should be protected. We think also that carriers may not, by withholding their equipment or facilities, dictate or control the markets which a particular shipper shall seek or enjoy, while adapting their services to the needs of a competing shipper. * * * By fixing the proportion of car supply which the coal company would be furnished by the respective carriers in conformity with its customary shipments and after conference with the president of the coal company these advantages were made available to the coal company. When fixing the proportion of car supply which would be furnished by the respective carriers to complainant like consideration was not given, but he was offered arbitrarily and without regard for the requirements of his business that which had been arranged for his competitor after deliberation. Such service would not have been similar or on a basis of equality between the shippers. The complainant was subjected thereby to undue and unreasonable disadvantage Under the circumstances complainant should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads. Upon all the facts of record we find that the acts and practices [fol. 95] of defendants whereby they accorded Maryland service to the mines of the West Virginia Coal & Coke Company located on the Coalton branch of the B. & O. during the period from October 14, 1922, to April 1, 1923, while failing to accord similar service to complainant's mine located intermediate thereto resulted in undue prejudice to complainant in the matter of car supply."

The second report dealt with the question of plaintiff's damage. 152 I. C. C. 327. It found that plaintiff "in fact ordered a 100 per cent supply of cars from the Western Maryland, but since that defendant would not honor his requisitions on that basis, he also placed his orders with the B. & O."; that he was entitled to receive from the Western Maryland 818.1 cars during the period in question, but actually received only 5 cars from the Western Maryland

and 367.8 from the B. & O.; that the cars furnished were loaded with an average of 53.35 tons; that the figures upon which plaintiff claimed loss of $57,735.11 were not questioned; that defendant's contention that plaintiff's mine was excessively rated would not be sustained in the absence of showing as to the ratings of other mines in the district; and that the amount claimed by plaintiff as damages would be reduced only because of the mitigation of loss finding and the average loading finding to which we have heretofore referred. With respect to these the report states:

"Complainant's mine was being served exclusively by the B. & O. He desired to order cars from the Western Maryland, and through verbal and written communications the matter was brought to the attention of B. & O. and Western Maryland officials. Complainant was informed that his competitors on the B. & O. Coalton branch were ordering 20 per cent of their car supply from the B. & O., and 80 per cent from the Western Maryland, and that a division of his orders on that basis would be acceptable. This proposition was rejected, as complainant desired to place orders for car supply with either or both carriers as he saw fit. At the hearing on damages, a witness for complainant denied that his mine was offered the 20-80 basis, but the con- [fol. 96] trary is clearly and repeatedly shown by testimony of the same witness at the first hearing.

* * * * * * *

"It is a familiar rule that a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss. United States v. F. & G. Co., 236 U. S. 512; Warren v. Stoddart, 105 U. S. 224; Western Real Estate Trustees v. Hughes, 172 Fed. 206; Hall v. Paine, 112 N. E. 153. That principle is applicable here. By reasonable action on his part in accepting defendants' 20-80 offer, complainant could have increased his production to the extent of 1,825 tons in October, 1,940 tons in November, 3,960 tons in December, 4,950 tons in January, 2,545 tons in February, and 1,485 tons in March. To this extent his damage was due to his own action and defendants cannot reasonably be expected to compensate him therefor. Complainant also erred in computing the tonnage that he could have produced, if he had been allowed to avail himself of the Western Mary-

land's car supply, by using an average loading of 53.55 tons per car. Under the rules 50 tons is used in determining the daily car rating and is likewise used in the rules governing distribution to coal mines. Making the latter correction, the profit per ton, if complainant had been permitted to order 100 per cent of his rating from the Western Maryland, would have been as follows: * * *."

It is clear from this statement that the question as to the sufficiency of the petition to support the judgment divides itself into three minor questions: (1) whether the petition alleges a cause of action upon which suit may be maintained; (2) whether the petition shows that plaintiff sustained damages to the amount adjudged in his favor; and (3) whether, in any event, plaintiff should not be limited in his recovery to the amount awarded by the Commission in its reparation order. We shall consider these questions in the order named.

On the first question, defendants contend that no cause of action is alleged because plaintiff was not entitled to Western Maryland car service, and, even if so entitled, was not prejudiced because the Coal & Coke Company was re- [fol. 97] stricted to the 80-20 arrangement offered plaintiff. We think it clear, however, that plaintiff attacked before the Commission the rule or practice of the carriers, and not merely the discriminatory enforcement of a rule, and that consequently the Commission was called upon to prescribe the standard of service that should have prevailed and that its administrative powers were invoked under section 15 of the Interstate Commerce Act, and not merely its quasi judicial powers. P. R. R. Co. v. Puritan Mining Co., 237 U. S. 121, 131; Morrisdale Coal Co. v. P. R. R. Co., 230 U. S. 304, 313; Powers v. Cady, 9 Fed. (2d) 458, 459. In such cases, the rule is well settled that we are bound by the action of the Commission. Mitchell Coal & Coke Co. v. P. R. R. Co., 230 U. S. 247, 258; Morrisdale Coal Co. v. P. R. R. Co., supra; U. S. v. L. & N. R. Co., 235 U. S. 314, 320-1. If, however, the questions raised be considered as questions of law which the courts have a right to review, we are satisfied, for the reasons given by the Commission, that its action thereon was correct. 112 I. C. C. 244. See also St. Louis S. W. R. Co. v. U. S., 245 U. S. 136, 144; U. S. v. P. R. R. Co., 266 U. S. 191, 197, 199.

On the second question, the contention of defendants is that the petition and attached reports of the Commission show that the deductions made by the Commission on account of its mitigation of loss finding and its average loading finding were properly made and that plaintiff is, therefore, not entitled to recover more than the amount of the award of the Commission. We may eliminate the average loading finding from consideration, as verdict and judgment are for an amount less than the damage claimed by more than the amount of the average loading deduction. As to the mitigation of loss finding, this is based upon the findings contained in the report of the Commission, which are admittedly based upon conflicting evidence, and not upon any facts alleged in the petition. Questions with regard thereto were thus raised to be passed upon by the jury in the light of the evidence, but there was nothing in the petition itself which required the deduction.

But even if the facts contained in the report of the Commission be considered as incorporated in the petition, we think that it clearly appears that the deduction on account [fol. 98] of the diminution of loss finding was erroneous as a matter of law. Plaintiff had a right to order 100 per cent of his car supply from the Western Maryland. It appears that he actually did order same in accordance with this right and that defendants wrongfully refused to recognize his requisitions. The fact that they offered to furnish him less than he was entitled to receive does not excuse their default or diminish his right to damages. It is true that it is the duty of one who is injured by another's breach of contract to use every reasonable effort to diminish his damages. But plaintiff did all that he was required to do when he placed orders for the cars to which he was entitled with the Western Maryland and upon failure to get them filed requisitions with the B. & O. and accepted all cars that were tendered him by both railroads. It was not incumbent on him to accept an offer of less than he was entitled to receive from the Western Maryland. Its offer of the 80-20 basis did not preclude it from furnishing the cars to which he was entitled when he made requisitions for them; and the responsibility for his damage rested not upon him but upon it. It is unthinkable that a party in default should escape liability for damages by attempting to force the other party to accept part performance as a condition to any perform-

ance at all. A party under contract to deliver 100 bales of cotton, for example, might diminish damages by proof that the other party could have purchased the cotton on the market at the time the contract was breached; but no court would seriously entertain the contention that damages should be diminished because he offered to deliver fifty bales in discharge of his liability to deliver a hundred.

We come then to the third question, which is the real question of the case, viz., was plaintiff precluded from recovering an amount greater than that awarded him by the Commission? Defendants base their contention upon Section 9 of the Interstate Commerce Act as amended (49 U. S. C. A. 9) which provides:

"Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own [fol. 99] behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *."

Their contention is that to allow plaintiff to sue for a greater amount than awarded by the Commission would be to allow him to sue in the courts for his claim after invoking the action of the Commission, which is in violation of the provisions of the section quoted. Reliance is based upon Standard Oil Co. v. U. S., 283 U. S. 235, in which the holding was that suit might not be brought in the courts on a claim after unsuccessful application to the Commission. The complete answer to this contention, we think, is that plaintiff's application to the Commission was not unsuccessful and his suit is not brought under Section 9. On the contrary, his application under Section 9 resulted in an award in his favor which defendants refused to pay. Suit was then instituted under Section 16(2) of the Act (49 U. S. C. A. 16(2)), which provides:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the com-

plainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless [fol. 100] they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

There is nothing in this section which limits the plaintiff to the amount awarded by the Commission. On the contrary, he is required to set forth "the causes for which he claims damages" as well as the order of the Commission; and it is provided that the suit shall proceed in all respects as other civil suits for damages, except that upon the trial of same the findings and order of the Commission shall be prima facie evidence of the facts therein stated. Not only does the general language of the section thus provide for the trial of the cause for which damages are claimed just as other civil actions are tried, but the effect of the findings and order of the Commission are limited in the exception to prima facie evidence. The question of interpretation is a typical one for the application of the maxim, "the exception proves the rule".

It is to be borne in mind that we are not dealing with a case where the Commission has denied relief in an application under Section 9, nor with a case where defendants have offered compliance with the order of the Commission and tendered payment thereunder. In such cases different considerations may well apply. But the case with which we are dealing is one where defendants have refused to comply with the Commission's order and it has been

necessary for plaintiff to institute suit under Section 16(2) to obtain relief. In such case we think it clearly the intention of the statute that the order with which defendants refused to comply should not limit the rights of plaintiff to any greater extent than it does those of defendants. As said by Judge Dickinson in Minds vs. Pennsylvania Railroad Company, 237 Fed. 267, 268, 270:

"After an order has been made by the Interstate Commerce Commission in favor of a complainant shipper against a railroad carrier for the payment of a damage award, proceedings brought in court because of the refusal of the carrier to comply with the order are properly for [fol. 101] the damages sustained by the complainant (limited to the amount set forth in the pleadings), and such proceedings are de novo, and the damages are to be found by the jury under all the evidence, including the findings of the Commission, which are made evidence by the acts of Congress. * * * If this language of the statute is taken at its face value, and the action regarded as one for damages, the whole proceeding is simplified. If the view now presented by the defendant is taken, a host of baffling queries rush upon the mind. The obstacles which shut out this view may be summed up in the observation that, if such be the law, the defendant is given the undeserved advantage of being in a position in which it may gain, but cannot lose, and all it risks in this speculation are costs and counsel fees."

And we agree with the following language of the same judge in Hillsdale Coal & Coke Co. v. P. R. R. Co., 237 Fed. 272, 275:

"If to paraphrase the language of Congress, this action, to which the act of the defendant has driven the plaintiff, is treated in all respects as an action for damages, except that all the findings of the Commission are made evidence, etc., all or nearly all troubling questions are eliminated. If the action is regarded as one to enforce the findings of the Commission, and they are further regarded as binding upon the plaintiff, but open to any attack by the defendant, then a veritable legal chaos reigns.

"It will be seen to follow that in such final action the administrative findings must (as in the case of a first

action at law) conclude everybody and settle the administrative facts. The facts to be found by the jury must be open ones to the defendant, and (at least may) be alike open to the plaintiff. The simplest view which might be taken of such a proceeding is that it is to be tried (with the exceptional features noted) precisely as the action for damages would have been tried, had the plaintiff gone first to the Commission to determine the administrative facts, and then brought his action; the administrative findings included in the report being treated as such preliminary findings. This would, however, open to the plaintiff the [fol. 102] opportunity to go beyond the cause of action presented to the Commission, and would be inconsistent with some of the provisions of the act of Congress. All such inconsistencies disappear, however, if the proceedings are treated as in the nature of appeal procedings, taking into court only the original complaint or cause of action presented to the Commission, but otherwise de novo, except for the evidentiary and other features ingrafted upon it by Congress, and with the administrative features conclusively established by the findings of the Commission, and the juridical facts open to be established by any otherwise proper evidence, and to be found under all the evidence, in the body of which is embraced the findings of fact by the Commission."

The Supreme Court in Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 430, thus interprets the prima facie clause of Section 16 (2) of the Statute:

"This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents."

In P. R. R. Co. v. Clark Bros., 238 U. S. 456, the Supreme Court, in holding that suit might not be brought in a state court while action was pending before the Commission, and that plaintiff might not seek treble damages under a state statute after invoking the provisions of the Interstate Commerce Act, but was bound by the provisions of that act, clearly intimated that the findings of the Commission as to the amount of damages were not binding on the plaintiff in

a suit instituted under Section 16 (2) of the act. The Court said at pages 472 and 473:

"The federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commissioner's finding, that statute determined

[fol. 103] the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court and there to secure treble damages under the state statute with respect to the same transactions. *This is not to say that the finding of the Commission as to the amount of damages has any other effect than that prescribed in section sixteen of the Act.* It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practiced, was then entitled to proceed for the recovery of damages in accordance with the Act, and not otherwise." (Italics ours.)

A case supporting the conclusion that a plaintiff is not bound by the finding of the Commission on the issue of damages in a case such as this is, Penn. R. Co. v Weber, 257 U. S. 85, a case which first appears in the reports of the Supreme Court as P. R. R. Co. v. Jacoby, 242 U. S. 89. In that case the plaintiff asked only the amount of damages awarded by the Commission. The Supreme Court on the first appeal reversed a judgment of the court below on account of the use of an erroneous basis of calculation by the Commission. Upon a subsequent trial of the cause plaintiff recovered the original amount by the introduction of additional evidence as to damages, and this was sustained by the Supreme Court on the second appeal. The importance of the decision lies in the fact that, although the damages awarded by the Commission could not be sustained, plaintiff was allowed to recover the full amount of his damages upon evidence which established the damages upon a different basis from that upon which the Commission had acted. See 269 Fed. 111 and 263 Fed. 945.

The conclusion at which we have arrived seems not only to me compelled by the language of the statute, but also to be the necessary interpretation if grave injustice is to be averted. Although Section 9 gives a right to resort to

the courts as an alternative to resort to the Commission, this right cannot be availed of by a shipper in a case such as this until he has secured an administrative determination by the Commission of the rule upon which his rights de- [fol. 104] pend. Penn. R. Co. v. Clark Coal Co., 238 U. S. 456, 469. If, as here, this administrative determination is delayed beyond the statutory limit for bringing suit, he must recover his damages before the Commission or not at all. If, in such case, errors of the Commission in the computation of damages could not be corrected in suit brought in the courts upon failure of the carrier to comply with the order of the Commission, the shipper would be without remedy. It is true that this reasoning would apply in cases where the Commission refuses to award damages as well as in a case such as this; but the adverse decision of the Commission on an administrative matter would be decisive on the shipper in all events. It is in cases where the administrative questions are decided with the shipper, and the Commission erroneously decides questions affecting the amount of damages against him, that injustice is likely to result.

The case before us is an apt illustration of what we have in mind. Plaintiff could not have gone into court without obtaining from the Commission an administrative determination of the questions upon which his right of recovery depended. When he obtained this determination, more than two years had elapsed and it was too late to go into court. 49 U. S. C. A. 16(3); Phillips Co. v. Grand Trunk Western Ry. Co., 236 U. S. 662. He had to proceed before the Commission or not at all. The Commission decided the administrative questions in his favor and found that he had sustained damage in the amount which he claimed, but refused to award damages in this amount because of what we conceive to be an utterly erroneous view of the law as to diminution of damages. Defendants refused to pay even the amount awarded, and plaintiff was compelled to institute this suit under Section 16. It seems to us that to deny him the damages which he is in law entitled to recover because of the erroneous view of the Commission as to the law, is warranted neither by the language of the statute nor by any rule of law applicable in the premises. We certainly will not strain the meaning of the statute to effect what seems to us such an unjust result.

After the filing of the reparation order of the Commission, plaintiff sought to enjoin the enforsement of same in a suit filed in the Northern District of West Virginia and [fol. 105] heard before a specially constituted court of three judges. That Court, two members of which are members of this, denied the relief prayed on the ground that the Court was without power to grant same, but, noticing the contention of plaintiff that he stood in danger of irreparable injury, pointed out that in a suit for damages he would not be bound by the error of the Commission in limiting the award. What was said by the Court in that opinion is relevant here. (Brady v. Interstate Commerce Commission, 43 Fed. (2d) 847, 851-2.)

"And when we look to the nature of reparation orders and consider the provisions which have been made for their enforcement and for the correction at law of any errors which they may contain, the conclusion that they were not intended to be included among those which might be enjoined or set aside is irresistible. As said by Judge Woolley in Pittsburgh & W. V. Railway Co. v. United States, (D. C.) 6 Fed. (2d) 646, 648: 'An order of the Commission awarding reparation is not a cause of action. Nor is it in the nature of a judgment on which execution may issue. It is an award of money damages and is declared by statute to be evidence, and then only prima facie evidence, of the facts found by the Commission * * * to be used only as such in an action which may be instituted after default by a carrier to obey the order of payment.' It is not thinkable that it should have been intended that a court of three judges should be convened, with direct appeal from their action to the Supreme Court, to pass upon the validity of an order which amounts to no more than prima facie evidence.

"In case a reparation order is not complied with and no suit is brought by the person in whose favor it is made, it amounts to nothing and could not of course be the cause of irreparable injury justifying an injunction order. If suit is brought, it proceeds 'in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated.' 49 U. S. C. A., sec. 16

(2). As said by the Supreme Court in Meeker & Co. v. Lehigh Valley R. R. Co., 236 U. S. 412, 430, 35 S. Ct. 328, 335, 59 L. Ed. 644, Ann. Cas. 1916B, 691, the section of the statute making these prima facie evidence 'cuts off no de- [fol. 106] fense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury.' If, therefore, the carrier deems the order erroneous, it has full opportunity to correct the error or defend against it upon the trial. Pittsburgh & W. V. Ry. Co. v. U. S., supra. If the party in whose favor it is made is not satisfied with it, he may in instituting his suit set forth the cause of action for which he claims damages, and the order of the Commission, and have his case proceeded with 'in all respects like other civil suits for damages,' except that on the trial the findings and order of the Commission shall be prima facie evidence of facts therein contained. There is nothing in the act, we think, which limits his recovery to the amount awarded by the Commission, and there is no reason why the recovery should be so limited. The order and findings of the Commission are prima facie evidence, just as is the report of an auditor in an action at law. Ex Parte Peterson, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919. And there is no more occasion to limit the recovery in the one case than in the other. We are advertent to the fact that in Western N. Y. & P. R. R. Co. v. Penn. Refining Co., supra, there are expressions to the effect that recovery is limited to the amount awarded by the Commission; but we do not understand that this holding was necessary to the decision in that case and, at all events, we do not accept it as a correct statement of the law. Not only does the rule announced in the Meeker case, supra, conflict with it, but so also does the intimation in Penn. R. Co. v. Clark Coal Co., 238 U. S. 456 at pages 472, 473, 35 S. Ct. 896, 59 L. Ed. 1406. It is apparent, therefore, that no irreparable injury is to be apprehended from reparation orders of the Commission, that any errors therein may be corrected in the trial provided for by statute, and that resort to injunction to set aside such orders is not permissible."

For the reasons stated, we think there was no error in the judgment below and same is accordingly affirmed.

Affirmed.

[fol. 107] In United States Circuit Court of Appeals, Fourth Circuit

No. 3283

The Baltimore and Ohio Railroad Company, a Corporation, and Western Maryland Railway Company, a Corporation, Appellants,

versus

A. Spates Brady, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia

Judgment—Filed and entered October 17, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Senior Circuit Judge.

October 17, 1932.

[fol. 108] In United States Circuit Court of Appeals

Petition of Appellants for Stay of the Mandate—Filed October 28, 1932

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Your petitioners, The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, appellants herein, respectfully represent that on the 17th day of October, 1932, this honorable Court entered a judgment herein, affirming the judgment of the United States District Court for the Northern District of West Virginia; that the mandate has not yet been issued, but will be issued in ac-

cordance with the rule of this Court, unless the issue thereof shall be stayed.

Your petitioners further represent that they intend to, and will, apply to the Supreme Court of the United States for a writ of certiorari to review said judgment of this Court; that they are drafting a petition for said writ of certiorari and have requested the Clerk of this Court to prepare a certified copy, and the additional copies, of the record required by the rule of said Supreme Court; that said petition will be based upon the grounds, among others, that there was error in awarding judgment to A. Spates Brady, appellee herein, for an amount in excess of that awarded by the reparation order of the Interstate Commerce Commission, with interest thereon, and in failing and refusing to effectuate the rule requiring the plaintiff to use or avail himself of reasonable means to minimize loss or damages, whereby his loss or damages would have been reduced to the amount of said Commission's said reparation order; that this Court has decided an important question of Federal law arising under the Interstate Commerce Act, which has not been, but should be, settled by said Supreme Court, or has decided a Federal question arising under said Interstate Commerce Act in a way probably in conflict with applicable decisions of said Supreme Court.

Your petitioners further represent that said petition for a writ of certiorari is being prepared with all speed consistent with careful regard to the rules and decisions of said Supreme Court, and your petitioners believe that said [fol. 109] petition will be filed in said Supreme Court within thirty days, or less, and they are using every reasonable effort to file the same within much less than said thirty days; that your petitioners, however, are unable to state the period within which said Supreme Court will decide whether or not said writ of certiorari should be issued, and if issued, the period of time within which said Supreme Court will decide said cause, and issue its mandate; that said petition for a writ of certiorari will be filed and this application for a stay of the issuance of the mandate is made, not for delay, but in order that justice may be done.

Your petitioners further represent that the judgment of said District Court, appealed from, was for the sum of sixty-three thousand and forty-eight dollars and sixty cents

($63,048.60), with interest from the 7th day of August, 1931, until paid; and that in said Court your petitioners, with good and sufficient surety, gave a supersedeas bond in the penalty of seventy-five thousand dollars ($75,000), conditioned for prosecuting their appeal to effect, answering the whole amount of said judgment, and all damages and costs, which bond was duly approved by said Court.

Your petitioners therefore pray that issue of the mandate herein may be stayed until said Supreme Court shall decide whether or not said writ of certiorari should be issued, and if issued, until said Supreme Court shall decide this cause and issue its mandate, or for such other reasonable time as this Court may deem just, and that they may have such other and further order as the premises may require. And your petitioners will ever pray, etc.

The Baltimore and Ohio Railroad Company, Western Maryland Railway Company, Appellants and Petitioners, by George M. Hoffheimer, of Their Counsel. George M. Hoffheimer, Charles R. Webber, Eugene S. Williams, E. A. Bowers, Counsel for Appellants and Petitioners.

[fol. 110] *Duly sworn to by George M. Hoffheimer. Jurat omitted in printing.*

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed October 28, 1932

Upon the application of the appellants, by George M. Hoffheimer, Esq., their counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above case be, and the same is hereby, stayed pending the application of the appellants in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

John J. Parker, Senior Circuit Judge.

October 28, 1932.

[fol. 111] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 112] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,223. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 526. The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, petitioners, vs. A. Spates Brady. Petition for a writ of certiorari and exhibit thereto. Filed November 25, 1932. File No. 37,223.

FILE COPY

Office Supreme Court, U.S.
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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 526

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, PETITIONERS,

versus

A. SPATES BRADY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE M. HOFFHEIMER,
CHARLES R. WEBBER,
EUGENE S. WILLIAMS,
E. A. BOWERS,
WILLIAM C. PURNELL,
Counsel for Petitioners.

The Daily Record Co. Print, Baltimore.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No.....

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, PETITIONERS.

versus

A. SPATES BRADY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, respectfully show:

I.

STATEMENT OF THE MATTER INVOLVED.

On October 17, 1932, the United States Circuit Court of Appeals for the Fourth Circuit (R. 107) affirmed a judgment of the District Court for the Northern District

of West Virginia rendered September 5, 1931, in favor of the respondent A. Spates Brady against your petitioners, The Baltimore and Ohio Railroad Company (hereinafter sometimes called the Baltimore & Ohio) and the Western Maryland Railway Company (hereinafter sometimes called the Western Maryland), for $63,048.60, with interest and costs. This does not include an attorney's fee for the respondent, all questions on which were reserved (R. 39).

The opinion of the Circuit Court of Appeals, reported as *Baltimore & O. R. Co. v. Brady,* 61 F. (2d) 242, is at page 89 of the record. A specially constituted District Court, pending this action, denied to Brady an injunction to annul that part of the Interstate Commerce Commission's order awarding him less than he claimed and recovered, the opinion being reported as *Brady v. Interstate Commerce Com.,* 43 F. (2d) 847, and this Court affirmed that decree (*Brady v. United States,* 283 U. S. 804). The District Court gave no written opinion in this action, except that refusing to sign bills of exceptions. (*Brady v. Baltimore & O. R. Co.,* 56 F. (2d) 231; R. 74). The Circuit Court of Appeals denied a writ of mandamus to require settlement and signature of bills of exceptions (*Baltimore & O. R. Co. v. Baker,* 58 F. (2d) 627), and this Court on October 3, 1932, denied a writ of certiorari to review that ruling (*Baltimore & O. R. Co. v. Baker,* No. 121, October Term, 1932). Therefore the record only presents the sufficiency of the petition, which exhibits and makes part thereof the reports and order of the Commission (R. 1, 10, 21, 31; *Brady v. Baltimore & O. R. Co.,* 112 I. C. C. 244; Id., 152 I. C. C. 327).

This action was under the Interstate Commerce Act, Secs. 8, 9, 16(1), 16(2), and 22 [USCA, Tit. 49, Ch. 1, Secs. 8, 9, 16(1), 16(2) and 22], as an election to proceed

before the Commission in the first instance, or under Secs. 13, 16(1) and 16(2) [USCA, Secs. 13, 16(1) and 16(2)] and the general decisions as to the scope and purpose of the Act, compelling resort to the Commission, such as *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, for damages for alleged undue and unreasonable disadvantage and discriminatory and unduly prejudicial practices by your petitioners, interstate carriers, in the distribution to the respondent's coal mine of coal cars for use in interstate commerce.

The respondent's petition, filed February 6, 1930 (R. 1), partly based on, and partly endeavoring to avoid, the Commission's findings and reparation order (R. 10, 21, 31), showed in substance, exclusive of the reports and order (R. 10, 21, 31), the following:

That the respondent operated a mine, during a period of car shortage, on a branch of the Baltimore & Ohio, between and adjacent to mines of the West Virginia Coal & Coke Company (hereinafter called the Coal Company), a competitor, on the same and another Baltimore & Ohio branch; that by agreement between your petitioners, effective during that period, the Western Maryland had and exercised trackage rights over the branches reaching and serving said competitive mines of the Coal Company, and had interstate rate schedules for coal therefrom. That each of said railways had in force rules and regulations governing the rating of coal mines and distribution of coal cars among the mines on their lines, which rules and regulations and certain rulings and decisions of the Commission required that during periods of shortage, available cars should be distributed pro rata among the mines in accordance with their ratings, or the orders of their operators, if less than their ratings; that they permitted the operator of any mine reached by two

railways to order 100 per cent. or less of its rating from either, or to divide the orders between the two in any way which his judgment dictated, provided the combined orders did not exceed 100 per cent. of the mine rating, and the mine was entitled to its pro rata of the available cars on the basis of such orders and to ship the coal loaded therein *via* the railroad which furnished the cars.

That as a result of said trackage agreement and rate schedules, the Coal Company's mines acquired the status of mines located on and reached by the two railroads, with the right, which it exercised, to order and receive cars from, and to ship *via,* either or both on the basis of such division of 100 per cent. of the mine ratings as its judgment dictated; that said agreement and the Western Maryland rate schedules did not name respondent's mine and he was denied the right to order and receive cars for loading from, and to ship *via,* either or both of the railways as his judgment dictated. That respondent requested your petitioners to accord his mine the status of one located on both railways, with the right, subject to the applicable rules and regulations, to order and receive cars from, and to ship *via,* either or both as his judgment dictated, but his requests were denied; that the Western Maryland, although honoring the Coal Company's orders for cars and placing them for loading, refused to honor respondent's orders, and with a single exception refused to place cars at his mine, whereupon he ordered cars, and received a reduced supply, from the Baltimore & Ohio; that "the said discriminatory acts and practices were unjust, unduly prejudicial and unlawful and in violation of the Interstate Commerce Act"; that if permitted, he would have chosen the Western Maryland and secured his entire car supply therefrom, because it had a much better supply than the Baltimore & Ohio, and would have shipped his entire output *via* the Western Maryland; and

that his loss of profits on the additional coal he would have produced and sold and his increased costs on the coal actually produced and sold aggregated $57,735.11.

The proceedings before the Commission were referred to (R. 5-7), and its two reports and order were exhibited with and made part of the petition (R. 6, 8, 10, 12, 31). As to them the petition alleged in substance that he filed with the Commission a complaint charging, among other things, that the discriminatory acts and practices in failing and refusing to serve respondent's mine with cars as therein described were in violation of the Interstate Commerce Act, and praying an award of reparation for the damages which he sustained as a result thereof. The petition alleged in substance: that after hearing and investigation the Commission, in its first exhibited report, held that "under the circumstances" the respondent should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent. of the rating of his mine as his judgment dictated, and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads; that the Commission further found and concluded in said report that the acts and practices of your petitioners resulted in undue prejudice to him; that the excess mining costs, $9,283.14, and loss of profits, $48,451.97, gave a total of $57,735.11, claimed by the respondent as his damages; and that your petitioners did not question the method or figures used by the respondent in this computation.

But the petition further averred that by the second exhibited report the Commission found that under the rule of mitigation of damages, the respondent, by accepting the offer made by your petitioners of 20 per cent. of his supply from the Baltimore & Ohio and 80 per cent. from

the Western Maryland, as he reasonably should have done, could have increased his production and reduced his loss, and that he had over-estimated the average car tonnage; that thereupon the Commission revised the computations "upon the said mitigation of loss-setoff and average loading findings" and arrived at $12,838.31 as the respondent's damages, which your petitioners were ordered to pay, with interest from April 1, 1923, amounting to $17,524.29, and entered an order accordingly; that the awarded reparation had not been paid.

The petition averred that "said mitigation of loss-setoff and average loading findings" were beyond the Commission's power, erroneous in law, null and void; that on January 17, 1930, respondent had filed in the District Court, a bill alleging "said mitigation of loss-setoff and average loading findings" to be beyond the Commission's power, without warrant in law, null and void, and praying a decree accordingly, annulling the same, and that the Court order the Commission to reopen the proceedings and to reconsider "said mitigation of loss-setoff and average loading findings," and make corrected findings and a supplemental order consistent with the order and decree of the Court (R. 8, 9).

That the respondent was entitled to judgment for said $17,524.29, in accordance with the Commission's order, and an additional sum which would bring the total to $57,735.11, with interest from April 1, 1923, and costs, including reasonable attorneys' fees.

Judgment was prayed for $57,735.11, with said interest.

The first report of the Commission, made part of and exhibited with said petition (R. 10) in substance found:

That the Western Maryland contracted with the Coal Company for 65 per cent. of its fuel needs, and obtained from the Baltimore & Ohio limited trackage rights for a maximum of 90 carloads per day from the mines of the Coal Company. That, with an apparently brief and immaterial exception, under the car distribution rules in effect during part of the period involved, as passed on by the Commission, a mine served by two roads, if it confined its orders to one road, was permitted to order 100 per cent. of its rating from that carrier; that a mine served by two cariers was not permitted to order cars in excess of 100 per cent. of its rating from both roads, but had a right to order its full rating from either if it desired and to divide its orders between the two roads as desired, provided the combined orders did not exceed 100 per cent. of its rating. That no opinion was expressed whether the Coal Company was entitled to order cars in conformity with rules for joint mines; and that except for a trivial exception, which was later adjusted and did not enter into the result, the Coal Company was restricted in combined orders to both roads to 100 per cent. of its rating. That it was agreed between your petitioners and the Coal Company that the latter's car supply would be furnished by the Western Maryland and the Baltimore & Ohio, respectively, in the proportions of 80 per cent. and 20 per cent., which division was adapted to the needs of the Coal Company based upon past shipments, and that similar consideration was not given to the respondent, who was advised that cars would be supplied by both carriers only in the proportions of 80 per cent. and 20 per cent., as with the Coal Company.

That by fixing the proportion of the Coal Company's car supply to be furnished by the respective carriers, in conformity with its customary shipments, and after consultation with it, advantages were made available to it in respect of markets, labor supply and efficient and eco-

nomical working; that like consideration was not given to respondent, but he was offered arbitrarily and without regard to the requirements of his business, that which had been arranged for his competitor after deliberation, and such service would not have been similar or on a basis of equality between shippers; that he was thereby subjected to undue and unreasonable disadvantage; that he should have been permitted to divide his car orders in such divisions of 100 per cent. of the mine rating as his judgment dictated, and cars should have been furnished accordingly in conformity with car supplies on the respective roads; and that respondent was entitled to reparation for undue prejudice.

By the second exhibited report (R. 21), insofar as material, it was found in substance that the respondent had been offered a car supply on the basis of 20 per cent. by the Baltimore & Ohio and 80 per cent. by the Western Maryland, and he refused the same; that his alleged loss was computed on an excessive tonnage per car; that under the rule that a party suffering a loss from breach of duty ought to do what a reasonable man would do to mitigate his loss, the respondent, by reasonable action in accepting the 20-80 offer, could have increased his production and diminished his loss, and to the extent of his failure to do so he could not be compensated; that for the undue prejudice respondent was damaged $12,838.31, for which, with interest, he was entitled to reparation, and your petitioners were jointly and equally responsible.

The reparation order was for $12,838.31, with interest from April 1, 1923 (R. 31).

The respondent unsuccessfully endeavored to rid himself of the reparation order by the suit in equity averred in the petition, with the result and reported as already stated.

Your petitioners demurred to the petition in the present action, generally as insufficient in law, and specially for the reasons that it was for a sum in excess of the Commission's award, and that the District Court, as a court of law, could not "consider, review, revise or reverse" the award (R. 33, 34). After the demurrers were overruled, there was a jury trial, resulting in the judgment appealed from (R. 39).

II.

QUESTIONS PRESENTED.

1. In an action at law by the shipper in the District Court, consequent on failure or refusal of the carrier to pay the amount of the Commission's reparation award, are the shipper's right of action and the Court's jurisdiction limited in maximum amount to the sum awarded by the Commission's reparation order, with interest, or can a greater amount be sued for and recovered?

2. In such an action at law following the Commission's reparation award of less than the shipper's claim, can the Court, at the instance of the shipper, adjudge that the Commission's award or findings diminishing the award in amount, were beyond the Commission's power or erroneous as a matter of law, and therefore void and without legal effect, and adjudge a recovery greater than the sum awarded by the reparation order, with interest?

3. Is it lawful and within the power of the Commission, in a report or an order of reparation, to find that the shipper has not complied with the rule that it is the duty of a party suffering loss to do what a reasonable man would, to mitigate his loss, and to apply that rule in diminution of the shipper's claim, and in its findings and order to refuse recovery of the amount by which the shipper could so have mitigated his loss?

4. In such an action at law can the Court, at the instance of the shipper, adjudge that the amount of the Commission's findings and award diminished by the Commision's finding that the shipper could have mitigated his loss by application of the rule as to mitigation of loss stated in the preceding Question 3, was beyond the Commission's power or erroneous as a matter of law, and therefore void and without legal effect, and adjudge a recovery of damages undiminished by such mitigation of loss?

5. In such an action at law is it material in respect of the amount recoverable, whether or not the proceedings before the Commission involved an administrative question, and so were compulsory on the shipper, or whether or not the shipper could have sued without first proceeding before the Commission, rendering the proceedings before the Commission voluntary; and if material, were the proceedings before the Commission administrative and a compulsory condition precedent to the suit?

6. In such an action at law can the Court, at the instance of the shipper, permit recovery of damages for alleged discrimination, where he was tendered the same proportions of car supply as his competitor was given, where, to allow the complaining shipper the proportions demanded by him, would in fact have accorded him an undue preference?

III.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided important questions of Federal law, which have not been, but should be, decided by this Court.

(a) In relation to the above Questions 1 to 4, both inclusive, this Court has never decided, that by rejection in whole or in part, the Commission's findings denying reparation or disappointing his expectation as to amount, or because of the carrier's failure or refusal to pay the amount awarded, the shipper, by action at law for a greater amount, can obtain a so-called "court review" or a judicial reversal or annulment of the findings and order as beyond, or in abuse of its power, or contrary to law, and so obtain a greater recovery.

(b) In relation to Questions 1 to 5, both inclusive, this Court has never decided that under the Interstate Commerce Act, Section 16(2), the Court can adjudge recovery of an amount greater than the amount of the Commission's award, whether the proceeding before the Commission was voluntarily elective under Sections 8, 9, 16(1), 16(2) and 22, or administrative and compulsory under those sections and Section 13, and the general decisions defining the scope and purposes of the Act and the administrative powers and discretion of the Commission.

(c) This Court has never decided whether or not in an action at law, following the failure or refusal of a carrier to pay the amount of the Commission's reparation order, the order, to the extent of its diminution or partial rejection of the shipper's claim, was an unreviewable negative order.

It is important to shippers and carriers that these questions be determined; and that it be determined whether in a judicial contest, for the protection of the public's, as well as the carrier's, interest, by diminution of its expenditures, the carrier throws everything to the hazard and gambles on the result by waiver of the limit of the award.

This Court has never given or sustained such a review or a recovery greater than the Commission's award, with interest; nor held that a reparation award less than that claimed is, as to the diminution, other than an unreviewable negative order; nor held that the measure of recoverable damages is different before the Commission than in the Court. In the limitation of the recoverable damages to the amount awarded by the Commission, the public has an interest which the carrier cannot lawfully waive.

2. The Circuit Court of Appeals has decided questions in a way probably in conflict with applicable decisions of this Court.

(a) In relation to the above Questions 1 to 4, both inclusive, even if the precise questions are undecided by this Court, the decision of the Circuit Court of Appeals is probably in conflict with the decisions of this Court, or the principles to be extracted from them.

(b) In relation to Question 5, there is a clear conflict with the applicable decisions of this Court holding an attack before the Commission, not on the carriers' rule or practice, but on the alleged unequal application, or the alleged violation or discriminatory enforcement, (here the apportionment on the basis of Western Maryland, 80 per cent., and Balti-

more & Ohio, 20 per cent.), of the rule or practice, does not involve an administative question; and that in the latter instance the Commission proceeding or reparation order is not a condition precedent to suit in the District Court.

3. The Circuit Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts of Appeals.

(a) In relation to the above Questions 1 to 4, both inclusive, it is in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in *Chicago, B. & Q. R. Co. v. Feintuch,* 191 Fed. 482, 486, the Circuit Court of Appeals for the Third Circuit in *Western New York & P. R. Co. v. Penn Refining Co.,* 137 Fed. 343, 353, and the Circuit Court of Appeals for the Seventh Circuit in *Bartlesville Zinc Co. v. Mellon,* 56 F. (2d) 154, certiorari denied, *Bartlesville Zinc Co. v. Mills,* No. 66, Oct. Term, 1932, as well as with the decision of the Court of Appeals of the District of Columbia in *Southern Transp. Co. v. Interstate Commerce Com.,* 47 F. (2d) 411.

A certified transcript of the record accompanies this petition.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 3283, The Baltimore and Ohio Railroad Company, a corporation, and Western Maryland Railway

Company, a corporation, Appellants, v. A. Spates Brady, Appellee, that the said judgment of said United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
WESTERN MARYLAND RAILWAY COMPANY,
Petitioners.

GEORGE M. HOFFHEIMER,
CHARLES R. WEBBER,
EUGENE S. WILLIAMS,
E. A. BOWERS.
WILLIAM C. PURNELL,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1932.

No.....

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, PETITIONERS,

versus

A. SPATES BRADY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The District Court rendered no written opinion. The opinion of the Circuit Court of Appeals, reported as *Baltimore & O. R. Co. v. Brady*, 61 F. (2d) 242, is at page 89 of the record. The relevant Interstate Commerce Commission reports are reported as *Brady v. Baltimore & O. R. Co.*, 112 I. C. C. 244; 152 I. C. C. 327; (R. 10, 21). A specially constituted District Court, pending this action, denied to Brady, respondent herein, an injunction to annul that part of the Commission's order awarding him less than he claimed and recovered, the opinion being reported as *Brady v. Interstate Commerce Com.*, 43 F. (2d) 847, and this Court affirmed that decree, *Brady v.*

United States, 283 U. S. 804. There were opinions refusing to sign (*Brady v. Baltimore & O. R. Co.,* 56 F. (2d) 231; R. 71), and refusing a mandamus to compel signature of, bills of exceptions (*Baltimore & O. R. Co. v. Baker,* 58 F. (2d) 627; certiorari denied, *Baltimore & O. R. Co. v. Baker,* No. 121, October Term, 1932).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered October 17, 1932 (R. 107). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (USCA, Tit. 28, Ch. 9, Sec. 347). (See *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.,* 284 U. S. 370; *Southern R. Co. v. Eagle Cotton Oil Co.,* 284 U. S. 675; *Lewis-Simas-Jones Co. v. Southern Pac. Co.,* 283 U. S. 654).

STATEMENT.

The principal facts have been set forth in the petition, pages 1 to 9, and in the interest of brevity are not repeated here. The relevant parts of the important statutes are set out in an appendix.

ERRORS ASSIGNED.

All of the errors assigned in the Specification of Errors hereinafter are intended to be urged. In the Circuit Court of Appeals (R. 89), they were embraced by Assignments of Error Nos. 1 and 61 (R. 40, 63; *Slacum v. Pomery,* 6 Cranch, 221, 223, 225; *Teal v. Walker,* 111 U. S. 242, 246; *Nalle v. Oyster,* 230 U. S. 165, 176; *Denver County Com'rs. v. Home Sav. Bank,* 236 U. S. 101. reversing *Board of Commissioners v. Home Sav. Bank,* 200 Fed. 28, 32; *Fleischmann Constr. Co. v. United States,* 270 U. S. 349, 355, 356).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that in an action at law by the shipper in the District Court consequent on failure or refusal of the carrier to pay the amount of the Commission's reparation award, the shipper's right of action and the Court's jurisdiction were not limited in maximum amount to the sum awarded by the Commission's reparation order, with interest, and that a greater amount could be sued for and recovered.

2. The Circuit Court of Appeals erred in holding that in such an action at law in the District Court after the Commission's reparation award of less than the shipper claimed, the District Court, at the instance of the shipper, could adjudge that the Commission's award or findings diminishing the award in amount, were beyond the Commission's power or erroneous as a matter of law and therefore void and without legal effect, and could therefore adjudge a recovery greater than the amount awarded by the reparation order, with interest.

3. The Circuit Court of Appeals erred in holding that it was not lawful or within the power of the Commission in its reports and order of reparation to find that the shipper had not complied with the rule that it is the duty of a party suffering loss to do what a reasonable man would to mitigate his loss, and to apply that rule in diminution of the shipper's claim, and in its findings and order to refuse recovery of the amount by which the shipper could so have mitigated his loss.

4. The Circuit Court of Appeals erred in holding that it was not lawful and within the power of the Commission to find in its reports and order of reparation that the failure or refusal of the shipper to accept 20 per cent. of his car supply from The Baltimore and Ohio Rail-

road Company and 80 per cent. from the Western Maryland Railway Company did not comply with the rule that it is the duty of a party suffering loss to do what a reasonable man would to mitigate his loss, and in its findings and order of reparation to apply that rule in diminution of the shipper's claim.

5. The Circuit Court of Appeals erred in holding that in such an action at law by the shipper, the Commission's finding that his loss could have been mitigated by acceptance of his car supply in the proportions offered by the carriers and the order diminishing the reparation to that extent, were beyond the Commission's power or erroneous as a matter of law, and therefore void and without legal effect, and that the District Court could so adjudge and grant a recovery of damages undiminished by such mitigation.

6. The Circuit Court of Appeals erred in holding that the proceeding before the Commission involved an attack on a rule or practice of the carriers as to the car supply from each, and therefore an administrative question, and that the proceeding before the Commission was compulsory and a condition precedent to suit in the District Court; and in not holding that the attack was on an unequal application or a violation or discriminatory enforcement of the car supply rule, for which the shipper could have sued without proceeding before the Commission, rendering that proceeding elective and voluntary.

7. The Circuit Court of Appeals erred in declining to hold that the refusal of petitioners to give respondent more cars than 80 per cent. Western Maryland and 20 per cent. Baltimore & Ohio resulted in no discrimination against respondent and no damage to him.

SUMMARY OF ARGUMENT.

I.

The shipper's right of action and the District Court's jurisdiction were limited in maximum amount to the sum awarded by the Interstate Commerce Commission's reparation order with interest, and the District Court could not grant recovery of a greater amount.

1. This Court has never directly decided the precise question above stated, as to the limitation of recovery by the amount of the reparation order, with interest, but the decision of the Circuit Court of Appeals is probably in conflict with the underlying principles and the language of applicable decisions of this Court as to Section 16(2) of the Interstate Commerce Act, and is in conflict with decisions of two other Circuit Courts of Appeals.

2. This Court has never sustained a recovery in excess of the award with accrued interest, whether or not the proceeding before the Commission was voluntary or elective, or administrative and compulsory.

3. This Court has not held that a reparation order less in amount than the sum claimed, is, as to the disallowance, other than an unreviewable negative order. The implication of the decisions has been that such an order, as to the amount disallowed, is negative and unreviewable.

4. This point that the amount of the reparation order, with interest, is the limit, is not foreclosed by the decisions as to the scope of Section 16(2).

5. The "full contestation" is the shipper's right to sustain the award by extrinsic evidence, and the carriers'

right to overcome it by evidence showing that the Commission was wrong.

6. The carrier does not and cannot throw everything to the hazard and gamble on the result in contesting the Commission's award. The analogies are against the lower Court's construction of Section 16(2). A carrier cannot lawfully waive or be estopped against anything falling within the purview of the Act. There is a public interest in a carrier's expenditures and in the prevention of preferences and discrimination.

7. The penalty for unsuccessfully contesting the Commission's award is payment of the shipper's attorney's fees and court costs.

II.

The shipper's petition in the District Court showed that the Commission reached the amount of the order of reparation by disallowing the sum by which the loss would have been minimized or avoided if he had accepted the offered proportions of car supply. The petition attacked the disallowance and sought its elimination, without which the verdict and judgment could not have been reached. Therefore the petition was insufficient to support the judgment. This is apart from the fact that the Commission's reports, including its findings and its order, were exhibited with and made part of the shipper's petition in the District Court.

1. The respondent's petition showed that the verdict and judgment included the damages denied by the Commission because of failure of the respondent to do what a reasonable man would have done to avoid, minimize or mitigate his damages by accepting the apportionment of the car supply offered by the carriers.

2. That petition exhibited and made part thereof the Commission's reports and reparation order. It cannot now be dismembered to eliminate the reports and order. A pleading must be taken most strongly against the party pleading.

3. The measure of damages in a reparation proceeding before the Commission and in a court is the same.

4. Both before the Commission and in the court, it is the duty of a party injured by breach of contract or tort to avoid, minimize or mitigate his damages by doing what a reasonable man would do.

5. The rule of avoidance, minimization or mitigation of damages does not constitute a so-called "loss-setoff," involving two findings, but is a rule that the damages assessable are only those which are the direct or natural consequence of the breach of contract or tort, and that damages, to the extent that they could have been avoided, minimized or mitigated, resulted from the act or neglect of the plaintiff and not of the defendant.

6. The duty of minimization or mitigation is not changed by the fact that it can only be obtained by acceptance of goods or services from the party in default.

III.

There was no administrative question requiring the respondent to proceed before the Commission for reparation. The limitation of recovery to the amount of the reparation order resulted from his own voluntary election of remedies. If there was an administrative question compelling procedure before the Commission, he pursued a right created by statute, coupled with a statutory remedy which was exclusive, and was subject to the

limitation imposed by the statute. The Commission did not sustain the shipper on, or even decide, the administrative question, if any. By unsuccessfully raising an administrative question he could not evade the limitation of recovery to the amount of the reparation order.

1. Respondent voluntarily elected to proceed before the Commission for reparation, when he could have sued in court in the first instance. The limitation of the recovery to the amount of the reparation order is the result of his voluntary election.

2. If the Commission's reports be eliminated, the petition is left in the state of alleging that the Commission found that the respondent had been unjustly discriminated against in not having been allowed to divide his car orders as his judgment dictated, without stating how or why the Commission reached that conclusion. Under the rule that a pleading must be taken most strongly against the pleader, it cannot be presumed that the question presented to the Commission was administrative.

3. Unless unpleaded facts are presumed in favor of the petition standing alone, and more strongly if the exhibited orders are read as part of the petition, under the accepted test of an administrative or non-administrative question, the matter before the Commission was not whether the carriers' rules and regulations were unreasonable or discriminatory but whether the carriers violated them or enforced them in a discriminatory way, and was not administrative.

4. If there was an administrative question compelling respondent to go before the Commission, he pursued a new right created by the statute, coupled with a provision for a special statutory remedy and subject to the

limitations which the statute prescribed, one of which was the limitation of the recoverable amount by Section 16(2) to the sum awarded by the Commission, with interest.

5. If the respondent's complaint before the Commission raised an administrative question, he did not sustain that proposition and the Commission did not decide the case on that basis. The Commission's decision was really that because, in fact, the Coal Company had been allowed to divide its car requisitions in accordance with its own judgment, based on its own business requirements, respondent was entitled to divide his requisitions in accordance with his own business requirements as his judgment interpreted them; and that in failing to proceed in that way there was unjust discrimination against respondent. If, therefore, respondent raised before the Commission an administrative question, he was unsuccessful on that point and he could not, by raising a question as to which he was unsuccessful, evade in court the limitation to the amount of the reparation order under Section 16(2).

IV.

There was no res adjudicata in Brady v. Interstate Commerce Commission, 43 F. (2d) 847, and *Brady v. United States,* 283 U. S. 804.

1. *Res adjudicata* was not pleaded by respondent.

2. The *Brady Case,* above cited, was dismissed for want of jurisdiction. The statements of the statutory District Court as to the administrative character of the question and the recoverable amount were *obiter dicta.*

3. The reasons of this Court for the affirmance in *Brady v. United States, supra,* can only be inferred from the citations in the memorandum opinion. It is thought that a proper interpretation shows that the decree was affirmed on the grounds (1) that the Commission's order minimizing the recovery was negative as to the amount disallowed, and (2) that even if the question of discrimination was an administrative question as claimed by the respondent, there could be no review of the facts found by the Commission in respect of the administrative question. The memorandum opinion does not show that this Court regarded an administrative question to have been present or decided by the Commission. The citations demonstrate that this Court did not pass upon the question whether Section 16(2) limited recovery in court to the amount of the reparation order.

4. The general expressions in the opinion in *Brady v. Interstate Commerce Commission, supra,* not essential to dispose of that case, do not control or determine the effect of the decree in the present case.

V.

The respondent not only was limited in recovery by the amount of the Commission's award, but suffered no discrimination or recoverable damages.

There was no discrimination against respondent, for he was offered the same car service that was given his competitor. To have permitted him to receive a higher percentage from the better car supply of the Western Maryland than was given his competitor would have resulted in unlawful discrimination in his favor. That being true the petition, when read with the exhibited reports showed that the respondent had no right of action.

ARGUMENT.

I.

THE SHIPPER'S RIGHT OF ACTION AND THE DISTRICT COURT'S JURISDICTION WERE LIMITED IN MAXIMUM AMOUNT TO THE SUM AWARDED BY THE INTERSTATE COMMERCE COMMISSION'S REPARATION ORDER WITH INTEREST, AND THE DISTRICT COURT COULD NOT GRANT RECOVERY OF A GREATER AMOUNT.

This Court has never directly decided the precise question whether or not the amount of the reparation order limited the amount of recovery in the District Court. But the decision of the Circuit Court of Appeals is probably in conflict with the underlying principle and the language of applicable decisions of this Court, and is plainly in conflict with decisions of other Circuit Courts of Appeals.

By Section 16(2) it is enacted that, "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant * * * may file * * * a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises."

This Court has not decided that a shipper can sue for, or that the District Court can adjudge recovery of, an amount greater than the Commission's award, whether the proceeding before the Commission was voluntarily elective under Sections 8, 9 and 22, or administrative and compulsory under those sections and Section 13 and the general decisions such as *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, defining the scope and purpose of the Act and the administrative powers and discretion of the Commission.

In no case has this Court sustained a recovery in excess of the Commission's award with accrued interest (*Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 422; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 434; *Mills v. Lehigh Valley R. Co.*, 238 U. S. 473, 476; *Southern Pac. R. Co. v. Darnell-Taenzer Lbr. Co.*, 245 U. S. 531, 533; *Pennsylvania R. Co. v. Minds*, 250 U. S. 368; *Pennsylvania R. Co. v. Weber*, 257 U. S. 85, 86, 90; *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, 239).

In *Standard Oil Co. v. United States*, 283 U. S. 235, 240, laying aside the absence of jurisdiction to "enjoin, set aside, annul or suspend, in whole or in part," "purely negative orders," and the holding that the courts do not review the Commission's decision on an administrative question, in the absence of suggestion that it had acted arbitrarily or without evidence or had transcended its constitutional or statutory powers, it was decided that the petition for a direction to the Commission to grant the prayer of the complaint before it was only "a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission;" and was "nothing less than an attempt to avoid the statute by indirection." Speaking of Section 9, evasion of which was not permitted in order to enable the shipper to obtain more than the nothing given by the Commission, it was said:

> "Section 9 of the Interstate Commerce Act * * * provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by an action in a federal district court of competent jurisdiction, but that the claimant or claimants 'shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.' Having elected

> to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking reparation upon the same claims by the alternative method of procedure."

In *Chicago, B. & Q. R. Co. v. Feintuch,* 191 Fed. 482, 486, and *Western New York & P. R. Co. v. Penn Ref. Co.,* 137 Fed. 343, 363, the Circuit Courts of Appeals of the Ninth and Third Circuits flatly held that there could be no recovery beyond the amount awarded by the Commission.

"A course of precedents and judicial proceedings in Courts of Justice make the law" (*Wilkes v. The King,* Wilmott, 322, 330; *Gordon v. Ogden,* 3 Pet. 33, 34; *Illinois Central R. Co. v. Turrill,* 110 U. S. 301, 304), and the general acquiescence by the profession, in suing for no more than the amount of the reparation order (except in the unsuccessful attempts in *Standard Oil Co. v. United States,* and *Brady v. United States, supra,* and except the course pursued in *Pennsylvania R. Co. v. Clark Brothers Coal Min. Co.,* 238 U. S. 456, 472, where the additional claim for discrimination in car distribution had never been brought before the Commission, and need not have been brought there), are cogent proof that no more than the amount of the Commission's award could be sued for. If there is no direct decision of this Court, it has been because, "the clearer a thing is, the more difficult it is to find any express authority or any dictum exactly in point" (*Keighley v. Durant,* (1901) A. C. 240; *Panama & S. P. Tel. Co. v. India Rubber, &c., Works Co.,* (1875) L. R. 10 Ch. 526). The absence of previous decision is good reason for granting the review herein applied for and deciding it now.

Nor has this Court held that a reparation order less in amount than the sum claimed is, as to the diminution, other than an unreviewable negative order (*Standard Oil Co. v. United States,* 283 U. S. 235, 238; *Brady v. United States,* 283 U. S. 804. See *Chicago, B. & Q. R. Co. v. Feintuch,* 191 Fed. 482, 486; *Western New York & P. R. Co. v. Penn Ref. Co.,* 137 Fed. 343, 353; *Bartlesville Zinc Co. v. Mellon,* 56 F. (2d) 154, certiarori denied, *Bartlesville Zinc Co. v. Mills,* No. 66, Oct. Term, 1932; *Southern Transp. Co. v. Interstate Commerce Com.,* 47 F. (2d) 411; *Manufacturers' R. Co. v. United States,* 246 U. S. 457, 482, 483; *Alton R. Co. v. United States,* 58 F. (2d) 399, 402; *Powers v. Cady,* 9 F. (2d) 458, 462, 463). The implication of the decisions has been that such an order as to the amount disallowed, is negative and unreviewable.

By the plain language of Section 16(2) suit can be brought by the shipper only if the carrier refuses to pay. Therefore, if the carrier pays or tenders the amount, however small, of the reparation awarded by the Commission there can be no suit.

This point that the amount of the reparation order, with interest, is the limit, is not foreclosed by the language of *Meeker v. Lehigh Valley R. Co.,* 236 U. S. 412, 422, and the cases following it. The statement in those cases that Section 16 of the Act, "only establishes a rebuttable presumption," "cuts off *no defense,* interposes no obstacle to a full contestation of all the issues and takes no question of fact from either court or jury," and "at most, therefore, it is merely a rule of evidence" and "does not abridge the right of trial by jury or take away any of its incidents," proves no more than this,—that, whether the shipper has gone before the Commission by voluntary election, or compulsorily because he has had to pursue *a statutory right by a statutory remedy with its*

limitations, the carrier, haled before the Commission involuntarily, is entitled to a jury trial and can still invoke all defenses. It is true that, while the Commission's findings and order are prima facie evidence, the complaining shipper may adduce additional evidence; but that is only additional evidence to support the findings and order and to overcome the carrier's evidence combatting them. But the prima facie character of the evidence, allowance of all defenses and right to contest all issues, does not disprove that *the Commission's order has the further function of limiting the amount which can be sued for or recovered*. As to that it is binding.

In *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291, although assumed that the shipper had unnecessarily obtained a reparation order from the Commission, it was said that the rule of damages before the Commission "could hardly be different from that proper for the" Court. As to the reparation award, it was said of Section 16:

> "*By the same section, if the carrier does not comply in due time with the order, the complainant may sue in a state court,—which implies that if the order has been complied with and the money paid no suit can be maintained.* It is to be noticed further that reparation before answer is contemplated as possible by Section 13, and in that case the carrier shall be relieved of liability to the complainant, though only, of course, for the particular violation of law. The decisions say that whatever the damages were, they could be recovered (*Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 202, 203; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 429); and that *the statute determines the extent of damages* (*Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 472). We are of opinion that all damage that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out

of its money, dwelt upon by the trial court, or the damage to its business following as a remoter result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid." (Italics ours).

In *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 471, where the case had been before the Commission under claim that the carrier's rule was unreasonable, it was held that the shipper was governed by the Federal statute in the measure of damages, and could not, in advance of an award by the Commission, proceed for treble damages under the State statute. It was said that the shipper, having invoked the Federal right,—

> "It was not possible for the plaintiff to ignore the statute it had thus called into play, and disregard its provisions for the purpose of measuring relief by local standards. The Federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court, and there to secure treble damages under the state statute with respect to the same transactions.
>
> "This is not to say that the finding of the Commission as to the amount of damages has any other effect than that prescribed in Section 16 of the act. It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practised, was then entitled to proceed for the recovery of damages in accordance with the act, and not otherwise. The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceeding before the Commission was pending and the plaintiff's right and remedy were fixed by the Federal act."

All the cases show that the "full contestation" is no more than a right of the shipper to sustain the Commission's award by extrinsic evidence, and a right of the carrier to overcome it by evidence showing that the Commission was wrong.

In *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430, it was said:

> "This provision only establishes a rebuttable presumption. It cuts off *no defense*, interposes no obstacle to a *full contestation of all the issues*, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents." (Italics ours).

The right of "contestation of all issues" is thus shown to be a right which "cuts off *no defense.*"

In *Mills v. Lehigh Valley R. Co.*, 238 U. S. 473, 482, it was said:

> "The statutory provision merely established a rule of evidence. It leaves every opportunity *to the defendant to contest* the claim." (Italics ours).

In *Spiller v. Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 131, it was said:

> "And the fact that a reparation order has at most only the effect of prima facie evidence * * *, being open to *contradiction by the carrier* when sued for recovery of the amount awarded, is an added reason for not binding down the Commission too closely in respect of the character of the evidence it may receive or the manner in which its hearings shall be conducted." (Italics ours).

In *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 258, this Court said:

> "They [the Commission's orders] are quasi judicial and only prima facie correct in so far as they determine the fact and amount of damage,—as to which, since it involves the payment of money and taking of property, *the carrier* is, by Section 16 of the act, given its day in court and the right to a judicial hearing." (Italics ours).

And in *Pennsylvania R. Co. v. Weber*, 257 U. S. 85, 90, it was said:

> "These cases [*Meeker and Mills Cases*] have disposed of the question of the right *of the defendant* to attack the prima facie value of the award, and have dealt with the nature of the award of the Commission, in view of the statutory provisions as to its character." (Italics ours).

In *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 472, previously quoted, the implication is similar.

If the Commission awards nothing, likewise there can be no suit. The carrier has nothing to pay or tender and therefore does not refuse to pay. The Commission's refusal of reparation is only an unreviewable negative order, and the order or the carrier's omission to pay what has not been ordered, cannot be circumvented, as shown by the *Standard Oil Co. Case*, 283 U. S. 235, 237, 238, in which all reparation was refused and there was denial of an injunction against dismissal by the Commission of complaints to recover damages for overcharges, and to compel the Commission to grant the complainant's prayer, a finding of overcharge and, if necessary, a further hearing to determine the amount.

In the instance of this very reparation order, *Brady v. United States,* 283 U. S. 804, affirming the decree of dismissal of *Brady v. Interstate Commerce Com.,* 43 F. (2d) 847, in a memorandum opinion, the citation of the *Standard Oil Co. Case,* evinced the view that as to the diminution by the Commission of the damages the reparation order was negative and unreviewable.

In *Bartlesville Zinc Co. v. Mellon,* 56 F. (2d) 154, certiorari denied, *Bartlesville Zinc Co. v. Mills,* No. 66, Oct. Term, 1932, a mandamus to compel an award was refused; and *Southern Transp. Co. v. Interstate Commerce Com.,* 47 F. (2d) 411, a mandatory injunction to compel the Commission to vacate a dismissal was denied.

An award for a given amount is a refusal of more, and, as to the excess, the award is negative and cannot be reviewed. (*Standard Oil Co. v. United States, supra; Bartlesville Zinc Co. v. Mellon, supra,* certiorari denied *Bartlesville Zinc Co. v. Mills, supra; Southern Transp. Co. v. Interstate Commerce Com., supra.* See *Manufacturers' R. Co. v. United States,* 246 U. S. 457, 482, 483; *Alton R. Co. v. United States,* 58 F. (2d) 399, 402; *Powers v. Cady,* 9 F. (2d) 458, 462, 463).

The view of the Court below was, in effect, that the carrier, by refusing to pay, waives the limit of the reparation order, throws everything to the hazard and gambles on the result in contesting the Commission's award. It is too often forgotten that when the public regulates the railroads, it also regulates itself. The analogies are against the lower Court's construction of Section 16(2). A carrier cannot lawfully waive, or be estopped against, anything falling within the purview of the Act, because there is a public interest in the carrier's expenditures and in the prevention of preferences and discrimination

in respect of rates and service and limitation upon claims and suits against it. Examples are the inability to waive a bill of lading limitation of time of notice of claims or suit (*A. J. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, 667; *Georgia F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 197; *Leigh Ellis & Co. v. Davis*, 260 U. S. 682), or a statutory limitation as to time of suit (*Kansas City Southern R. Co. v. Wolf*, 261 U. S. 133), or to waive tariff rates or terms of service (*Southern R. Co. v. Prescott*, 240 U. S. 632, 638); or to be estopped against collection of the full legal tariff rate (*Chesapeake & O. R. Co. v. Martin*, 283 U. S. 209, 222).

To subject the carrier refusing to pay a reparation order to the risk of throwing off the limit would penalize and discourage resort to the jury trial which the statute contemplates. It would also permit the discrimination which the whole Act intends to prevent, by discarding the limit in favor of the shipper who sues, and insisting on it by payment to the others. Section 8 of the Act sufficiently penalizes the carrier for exercising his right of contest to a jury trial, by rendering it liable for "a reasonable counsel or attorney's fee, to be fixed by the Court in every case of recovery." The carrier is also liable for the recovering shipper's "costs in the case."

II.

THE SHIPPER'S PETITION IN THE DISTRICT COURT SHOWED THAT THE COMMISSION REACHED THE AMOUNT OF THE ORDER OF REPARATION BY DISALLOWING THE SUM BY WHICH THE LOSS WOULD HAVE BEEN MINIMIZED OR AVOIDED IF HE HAD ACCEPTED THE OFFERED PROPORTIONS OF CAR SUPPLY. THE PETITION ATTACKED THE DISALLOWANCE, AND SOUGHT ITS ELIMINATION, WITHOUT WHICH THE VERDICT AND JUDGMENT COULD NOT HAVE BEEN REACHED. THEREFORE THE PETITION WAS INSUFFICIENT TO SUPPORT THE JUDGMENT. THIS IS APART FROM THE FACT THAT THE COMMISSION'S REPORTS, INCLUDING ITS FINDINGS AND ORDER, WERE EXHIBITED WITH AND MADE PART OF THE SHIPPER'S PETITION.

Respondent's petition in the District Court averred that the "increased cost of mining and selling the coal actually produced and sold, aggregated the sum of $57,735.11" (R. 5), but complained that, although the Commission in the first exhibited report found that the shipper claimed that his excess mining costs were $9,283.14 and his lost profits $48,451.97, a total of said $57,735.11, as to the computation of which, it was said, your petitioners did not question the method or figures used, the Commission, under the "rule that a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss," found that by reasonable action in accepting the carriers' "20-80 offer" the respondent could have increased his production, "and to this extent his damage was due to his own action and the defendants cannot reasonably be expected to compensate him therefor" (R. 7). There was also an averment that the Commission found that the tonnage which respondent could have produced, if he had been allowed the Western Maryland car supply, was based on an excessive loading tonnage per car (R. 7). It was further alleged that the Commission, by the second exhibited report "made revised mathematical computa-

tions based upon the said mitigation of loss-setoff and average loading findings, and arrived at $12,838.31 as the amount of respondent's damages and entered a reparation order dated February 28, 1929, directing the carriers to pay respondent said $12,838.31, with interest from April 1, 1923, to wit, $4,685.98, or a total of $17,524.29," which was unpaid (R. 7). The petition attacked what it termed "the said mitigation of loss-setoff and average loading findings," not on the ground that they were not established facts, but as beyond the Commission's power, erroneous in law and void; and alleged the pendency of its bill in equity attacking "the said mitigation of loss-setoff and average loading findings" (*Brady v. Interstate Commerce Com.*, 43 F. (2d) 847). The respondent claimed recovery of judgment for the $17,524.29, with interest from May 1, 1929, and such additional sum as, when added thereto with interest from the same date, would make a total of said $57,735.11, with interest on the total from April 1, 1923. The prayer was for judgment for said $57,735.11, with said interest (R. 8, 9).

The verdict was for $63,048.60 (R. 38), and the judgment was for the same amount, with interest from August 7, 1931 (R. 39).

The Circuit Court of Appeals, regarding the amount of the reparation order not to limit the recovery, gave no heed to the inclusion of the $9,238.14 for excessive car tonnage, because it thought that evidence not before the Court in the absence of bills of exceptions, might have warranted the restoration of the amount deducted by the Commission for excess mining costs. The Court, however, considered and held improper the so-called "mitigation of loss set-off" because of failure to accept the car supply offered by the two carriers (R. 98). But, after raising *sua sponte* the question whether the reports

were really part of the petition, it considered them (R. 97, 98).

What has been said shows that the question of minimization or mitigation of damages appeared on the face of the petition; that the Commission made the disallowances; that the verdict and judgment could not have been arrived at without inclusion of at least the greater part of the damages which could have been avoided by acceptance of the offered car supply; and that therefore the petition does not support the judgment, and the judgment is erroneous.

It has been held that "the coincidence of the amount as awarded" by the Commission "and the amount ascertained by the use of percentages" in incorrect tables, made it "almost mathematically certain that the result" before the Commission "could have been reached in no other way" than on the basis of the erroneous tables, and that the District Court erred against the carrier in refusing a charge correcting the error (*Pennsylvania R. Co. v. Jacoby,* 242 U. S. 89, 99). After reversal and retrial this Court again adverted to "the coincidence of percentage and award," and held that "the conclusion is inescapable that the Commission in determining the sum awarded, used percentages which had the basis of placing the plaintiff on a basis of equality with the favored companies." But as the judgment was only for the sum awarded by the Commission with interest, and there was testimony tending to show damages in at least the amount of the award, there was no prejudicial error (*Pennsylvania R. Co. v. Weber,* 257 U. S. 85, 86, 91). The amount of the verdict and judgment in the instant case, unattainable except by inclusion of the amount which the Commission had disallowed as resulting from refusal to ac-

cept the offered car supply, renders the conclusion inescapable that the judgment included this amount.

Further, although the Act, Section 16(2) required the findings and order of the Commission to be filed and constituted them prima facie evidence of the facts therein stated, the respondent went further and exhibited the reports and order with, and made them part of, the petition (R. 6, 7, 8), thereby requiring your petitioners to plead thereto, which they did. The petition cannot now be dismembered by rejection of the reports and order. Both at common law and in equity a pleading must be taken most strongly against the party pleading (4 *Encyc. Pl. & Pr.*, 759, 762; *United States v. Linn*, 1 How. 104, 110; *Dougherty v. Catlett*, 129 Ill. 431; *Bowker v. Torrey*, 211 Mass. 282; *Schuler v. Southern Iron & S. Co.*, 77 N. J. Eq. 60; *DuPont v. Gardiner*, 238 Fed. 755, 758).

The measure of damages in a reparation proceeding before the Commission and in a court are the same. In *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 290, it was said:

> "By Section 8 a common carrier violating the commands of the act is made liable to the person injured thereby 'for the full amount of damages sustained in consequence' of the violation * * *. By Section 9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other. An award directing the carrier to pay to the complainant the sum to which he is entitled is provided for by Section 16".

To the same effect are: *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 472; *Pennsylvania R.*

Co. v. International Coal M. Co., 230 U. S. 184, 204; *George A. Hormel & Co. v. Chicago, M. & St. P. R. Co.*, 283 Fed. 915, 918, 919; *Keogh v. Chicago & N. W. R. Co.*, 260 U. S. 156. Similarly, in *Kansas City Southern R. Co. v. Wolf*, 261 U. S. 133, and *A. J. Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662, 667, it was held that under Section 16 the provision limiting the filing of complaints for recovery of damages with the Commission to two years applied equally to a suit in court; that "to have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the various states, where a suit was brought * * *; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others,—would be to prefer some and discriminate against others" and that "the Railroad Company, therefore, was bound to claim the benefit of the limitation of Section 16 when sued in the Federal Court."

The rule applies, therefore, both before the Commission and in the court, that it is the duty of a party injured by breach of contract or by tort to avoid, minimize or mitigate his damages by doing what a reasonable man would do. (*The Baltimore*, 8 Wall. 377; *Warren v. Stoddart*, 105 U. S. 224, 229; *United States v. United States F. & G. Co.*, 236 U. S. 512, 526; *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 489; *Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 30, 31; 1 *Sutherland, Damages* (4 Ed.), Secs. 88-90, 155; 1 *Sedgwick, Damages* (9 Ed.), Secs. 201, 202, 214-215.)

The odd conception of the respondent that the rule diminishing recoverable damages to the extent to which the complaining party might reasonably have avoided, minimized or mitigated damages, involves two findings, (1) the full amount of damages which would have accrued

in the absence of the duty of minimization; and (2) the amount of avoidance, minimization or mitigation which would have resulted from reasonable effort, and that there is a so-called "loss-setoff" (R. 7, 8, 9), is without foundation. It is merely an attempt to show an initial finding of loss, increasing the debit side of the reparation order, so as to increase the limit of recovery in court. There are never two such separate findings. The finding or assessment of damages is merely the net amount of the direct or natural consequences of the breach of contract or tort. A plaintiff cannot recover unreasonable enhancement of damages, or damages due to his failure to exercise reasonable care and diligence to avoid them, since the damages resulting from his voluntary act or his neglect to exercise reasonable effort to limit the injury and prevent damages are attributable to him and not to the defendant. (*Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26; 8 R. C. L. 442; 1 *Sedgwick, Damages* (9 Ed.), Secs. 201, 202, 205.)

The thought of the Circuit Court of Appeals that "it is unthinkable that a party in default should escape liability for damages by attempting to force the other party to accept part performance as a condition to any performance at all", is groundless. A minimization or mitigation, is none the worse, nor the duty to make it less, because it can be obtained only by acceptance of goods or services from the party in default.

In *Warren v. Stoddart*, 105 U. S. 224, 229, it was held that a book canvasser, who claimed to have been entitled to the books from the publisher on credit, but who was refused the credit, should have paid the publisher cash for the books required to fill his orders, or have allowed the publisher to fill the orders and divide the profits on equitable terms, and that the law required him to take

that course by which he could secure himself with the least damage to the publisher. The case is authority that acceptance of delivery on different terms so as to minimize damages is required and does not waive a right of action for breach of the contract.

In *Lawrence v. Porter,* 63 Fed. 62, 66 (C. C. A. 6), Judges Lurton and Taft, held that where the plaintiff, the only dealer able to furnish the particular kind of lumber, violated the contract to furnish it on credit, and thereafter immediately offered to deliver for cash, the plaintiff was not justified in refusing to accept that offer. It was said:

> "The obligation on the buyer to mitigate his loss, by reason of the seller's refusal to carry out such a sale, is not relaxed because the delinquent seller affords the only opportunity for such reduction of the buyer's damage. *Warren v. Stoddart,* 105 U. S 224; *Deere v. Lewis,* 51 Ill. 254."

See, also, *Deere v. Lewis,* 51 Ill. 254; *Heilbroner v. Hancock,* 33 Tex. 714; *Hodges v. Fries,* 34 Fla. 63; *Huntington Easy Payment Co. v. Parsons,* 62 W. Va. 26.

III.

THERE WAS NO ADMINISTRATIVE QUESTION REQUIRING THE RESPONDENT TO PROCEED BEFORE THE COMMISSION FOR REPARATION. THE LIMITATION OF RECOVERY TO THE AMOUNT OF THE REPARATION ORDER RESULTED FROM HIS OWN VOLUNTARY ELECTION OF REMEDIES. IF THERE WAS AN ADMINISTRATIVE QUESTION COMPELLING PROCEDURE BEFORE THE COMMISSION, HE PURSUED A RIGHT CREATED BY STATUTE, COUPLED WITH A STATUTORY REMEDY WHICH WAS EXCLUSIVE, AND WAS SUBJECT TO THE LIMITATION IMPOSED BY THE STATUTE. THE COMMISSION DID NOT SUSTAIN HIM ON, OR EVEN DECIDE, THE ADMINISTRATIVE QUESTION IF ANY. BY UNSUCCESSFULLY RAISING AN ADMINISTRATIVE QUESTION HE COULD NOT EVADE THE LIMITATION OF RECOVERY TO THE AMOUNT OF THE REPARATION ORDER.

The Circuit Court of Appeals considered that the respondent attacked before the Commission a rule or practice of the carriers, and not merely the discriminatory enforcement of a rule; that the Commission was called upon to prescribe the standard of service which should have prevailed and that its administrative powers were invoked; that, therefore, the respondent was compelled to proceed before the Commission in order to obtain a finding of discrimination, which the Court deemed an administrative question; that by the time the decision had been obtained the statutory period for suit, except as preceded by a reparation order, had expired; and that this situation reinforced the view that the amount of the reparation order did not limit the sum recoverable by suit. (*Baltimore & O. R. Co. v. Brady*, 61 F. (2d) 242, 246-249; R. 97, 104).

The petition herein, pages 3 to 6, sets forth the substance of respondent's petition in the District Court and the two exhibited Commission reports made part thereof. We have already argued that the reports were part of said petition. But if the reports be eliminated, the petition is left in the state of alleging that the Commission found that respondent had been unjustly discriminated against, in that he should have been allowed to divide his car orders in such divisions of 100 per cent. of his mine rating as his judgment dictated, and that cars should have been accordingly furnished, without stating how or why the Commission reached that conclusion. Under the rule previously stated, that a pleading must be taken most strongly against the party pleading, nothing can be presumed in favor of the petition, nor can it be presumed that the question presented to the Commission was administrative.

Likewise, in *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 128, it was said:

> "It will be seen that this section does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts. The express grant of the right of choice between those two remedies was the exclusion of any other remedy in a state court; and that the Federal tribunals have exclusive jurisdiction of a certain class of cases referred to in section 9 has been recognized in the few decisions dealing with the question."

See, also, *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184, 200. Cf. *Blumenstock Bros. etc. Agency v. Curtis Publishing Co.*, 252 U. S. 436, 441; *South Covington etc. R. Co. v. Newport*, 259 U. S. 97, 99.

Unless unpleaded facts are presumed in favor of the petition standing alone, and more strongly, if the exhibited orders are read as part of that petition, under the accepted test of an administrative or non-administrative question the matter before the Commission was not whether the carriers' rules and regulations were unreasonable or discriminatory, but whether the carriers violated their own rules and regulations or enforced them in a discriminatory way.

The rule in car distribution cases is stated in *Illinois Central R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 282, where, summarizing *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 131, 132, it was said that upon a review of Sections 8, 9 and 22 it had been held:

> "That in actions against railroad companies for unjust discrimination in interstate commerce where the rule of distribution itself is attacked as unfair

> or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Commission; but if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or the Federal courts. And because in that case the action was not based upon the ground that the carrier's rule of car distribution was unreasonable or discriminatory, but that plaintiff was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled even upon the basis of the carrier's own rule of distribution, it was held that the state court had jurisdiction without previous application to the Interstate Commerce Commission."

See, also, *Pennsylvania R. Co. v. Sonman Shaft C. Co.*, 242 U. S. 120, 124; *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456; *Pennsylvania R. Co. v. Stineman Coal Min. Co.*, 242 U. S. 298; *Midland Valley R. Co. v. Barkley*, 276 U. S. 482, 484; *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304.

Mitchell Coal & C. Co. v. Pennsylvania R. Co., 230 U. S. 247, 258, shows that it was "extremely doubtful whether, at common law", the shipper had a right of action because of discrimination. And see *Interstate Commerce Com. v. Baltimore & Ohio R. Co.*, 145 U. S. 263. But in the *Mitchell Coal & C. Co. Case*, at page 258, it was said, "But if any such right existed it was abrogated or forbidden by the commerce act, and one was given which, as a condition of the right to recover, required a finding by the Commission that the allowance was unreasonable and operated as unjust discrimination, or as an undue

preference." While it was added that orders finding an allowance unreasonable and operating as an unjust discrimination or undue preference, so far as administrative, are conclusive, they are quasi judicial and only prima facie correct in so far as they determined the fact and amount of the damage,—"as to which, since it involves the payment of money and taking of property, *the carrier* is, by Section 16 of the act given a day in court and the right to a judicial hearing." (Italics ours.) This decision is plain that a new statutory right was created, coupled with an exclusive statutory remedy, which as to amount was limited by the reparation order.

See, also, *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 128; *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184, 200.

But if there was an administrative question compelling him to go before the Commission for a finding of undue preference or unjust discrimination and/or an order of reparation, respondent pursued a new right, created by the statute, which provided for a special statutory remedy, subject to the limitations and conditions which the statute prescribed. One of the conditions of the remedy was the limitation of the recoverable amount by Section 16(2) to the sum awarded by the Commission, with interest.

"Where a statute creates a new right, coupled with a provision for a special remedy, that remedy and that alone must be employed." The remedial provision is exclusive. (*Barnett v. Muncie National Bank*, 98 U. S. 555; *Fourth National Bank v. Francklyn*, 120 U. S. 747, 756; *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U. S. 165, 175.)

In *Pennsylvania R. Co. v. Clark Bros. Coal M. Co.*, 238 U. S. 456, 472, it was said in answer to the contention of the Mining Company that it could have sued in the first instance without going before the Commission:

> "But when, as a result of its own insistence upon its Federal right under the act, it appeared that the act had been violated and that the special remedial provisions of the act were applicable, it was not possible for the plaintiff to ignore the statute it had thus called into play, and disregard its provisions for the purpose of measuring relief by local standards. The Federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court, and there to secure treble damages under the state statute with respect to the same transactions.
>
> * * * * * *
>
> "It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practised, was then entitled to proceed for the recovery of damages in accordance with the act, and not otherwise. The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceeding before the Commission was pending and the plaintiff's right and remedy were fixed by the Federal act."

See *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 131.

Still proceeding on the unjustified theory that respondent's complaint before the Commission raised an administrative question, he did not sustain that proposition and the Commission did not decide the case on that basis. It

held the question whether or not the Coal Company (and inferentially whether or not respondent) was entitled to a joint mine status was negligible, and it was left undecided. The Commission's decision really went off on the proposition that because, in fact, the Coal Company had been allowed to divide its car requisitions in accordance with its own judgment, based on its own business requirements, which happened to be Western Maryland, 80 per cent. and Baltimore & Ohio, 20 per cent., therefore, respondent was entitled to divide his requisitions in accordance with his own business requirements as his own judgment interpreted them, and that in failing previously to proceed in that way there had been unjust discrimination against respondent.

If, therefore, respondent did, by his complaint before the Commission, raise an administrative question, he was unsuccessful on that point, because the Commission rejected it. In *Lambert Run Coal Co. v. Baltimore & O. R. Co.*, 258 U. S. 377, 383, it was held:

> "For, while it is true that a plaintiff by his first pleading determines what right he will sue on, and that the defenses, set up either anticipatorily by him or in due course by the defendant, cannot affect the jurisdiction when it depends on that right, yet the plaintiff may not, by alleging a frivolous claim or a fictitious situation, confer upon a court jurisdiction which, as determined by the plaintiff's real cause of action, it has not. * * * The district court should therefore have dismissed the bill as soon as it became apparent that the suit was one to set aside an order of the Commission."

In *Armour & Co. v. Fort Morgan S. S. Co.*, 270 U. S. 253, 259, it was similarly said:

> "Jurisdiction in admiralty cannot be effectively acquired by concealing for a time the facts which establish that it does not exist."

It follows that, by unsuccessfully claiming before the Commission the existence of an administrative question and emerging with a favorable decision on a non-administrative ground, respondent could not in that way evade,—even if success before the Commission on the administrative question would have evaded—, the limitation in court to the amount of the reparation order.

As will be shown in a subsequent section, it does not appear that the appeal was decided on the ground that the question was administrative or that the limit of recovery was not fixed by Section 16(2).

IV.

THE ISSUES INVOLVED ARE NOT RES ADJUDICATA BY REASON OF BRADY V. INTERSTATE COMMERCE COMMISSION, 43 F. (2D) 847, AND BRADY V. UNITED STATES, 283 U. S. 804.

Although never pleaded, we anticipate repetition here of the respondent's argument below, that it was decided in *Brady v. Interstate Commerce Com.*, 43 F. (2d) 847, and in *Brady v. United States*, 283 U. S. 804, that an administrative question was involved, and that the Commission's order of reparation did not limit the recovery in court. That case was dismissed for want of jurisdiction, and the statements in the opinion of the Circuit Court of Appeals as to the administrative character of the question and the amount of recovery were mere *obiter dicta*. The reasons of this Court for the affirmance in *Brady v. United States*, 283 U. S. 804, can only be inferred from the citations. It is thought that a proper interpretation of the citations shows that the decree of dismissal was affirmed on the grounds (1) that the Commission's order minimizing the recovery was negative as to the amount disallowed, and (2) that even if the question of discrimination decided by the Commission was an administrative question, as claimed by the present respondent, then appel-

lant, there could be no review of the facts found by the Commission in respect of the administrative question. The memorandum opinion does not show that this Court regarded an administrative question actually to have been present or decided by the Commission. The omission of citation of *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, and the similar cases in this Court, so much relied on by the statutory District Court, demonstrates that this Court did not pass upon the question whether Section 16(2) limited recovery in the District Court to the amount of the reparation order.

The dicta in *Brady v. Interstate Commerce Commission*, supra, cannot control the decree of dismissal.

In *Harriman v. Northern Securities Co.*, 197 U. S. 244, 291, it was said:

> "Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.
>
> "This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. *Cohen v. Virginia*, 6 Wheat. 399; *Carroll v. Carroll's Lessees*, 16 How. 279."

In *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 460, it was said:

> "The determination of the questions now raised under the Clayton Act was not essential to the former decision. The defendants in their argument seize upon isolated passages in the opinion of the court in the former case, and contend that they are decisive here. But the effect of the former judgment as an estoppel is not to be thus determined. *Vicksburg v. Henson*, 231 U. S. 259, 269, and cases therein cited."

See, also, *Russell v. Place,* 94 U. S. 606; *Cromwell v. Sac County,* 94 U. S. 351; *Southern Pac. R. Co. v. United States,* 168 U. S. 1.

V.

THE RESPONDENT NOT ONLY WAS LIMITED IN RECOVERY BY THE AMOUNT OF THE COMMISSION'S AWARD, BUT SUFFERED NO DISCRIMINATION OR RECOVERABLE DAMAGES.

The petition in the District Court alleged a finding by the Commission that the Commission had recognized that the Coal Company had a joint mine status, and that it accorded to the Coal Company the right to order 100 per cent. of its car requirements in the proportions which its own judgment dictated. It also alleged that the Commission had found that the respondent was entitled to, but had been refused, 100 per cent. of his car requirements divided in the proportions which his judgment dictated, and that the respondent had been unjustly discriminated against. By the reports made part of the petition, however, it appeared that the Commission did not decide that either the Coal Company or the respondent was entitled to a joint mine status, but did decide that the Coal Company had been accorded 100 per cent., apportioned on the basis of Baltimore & Ohio 20 per cent. and Western Maryland 80 per cent., which, based on past shipments, was in accordance with the Coal Company's requirements, and that by reason thereof the respondent was entitled to 100 per cent. divided as his judgment dictated, in conformity with the available supplies on both railroads.

The petition, however, artfully concealed what was disclosed by the first exhibited report,—that the Western Maryland's trackage rights were occasioned by the fact that the Coal Company was under contract with the Western Maryland to furnish it with 65 per cent. of its own fuel, and that the allocation of cars for general com-

mercial purposes was merely incidental or subsidiary to the Western Maryland fuel contract. It did not appear that Brady had any fuel contract with the Western Maryland. The Interstate Commerce Act does not prohibit preference or discrimination, but only undue preference or unjust discrimination.

The petition, with the exhibited reports, therefore, does not show that the allocation of 20 per cent. by the Baltimore & Ohio and 80 per cent. by the Western Maryland was an undue preference to the Coal Company or an unjust discrimination against the respondent. On the contrary, it is clear from the petition and reports that car service on the basis of 80 per cent. from the Western Maryland and 20 per cent. from the Baltimore & Ohio was relatively as advantageous and valuable to respondent as to the Coal Company, and that if the respondent had been permitted to do what he professed to be his desire and purpose, he would have ordered his whole car supply from the Western Maryland, which he alleged to have a better supply in the aggregate than the Baltimore & Ohio, as a result of which he would have obtained an advantage over the Coal Company, which was tied down to an allotment of 80 per cent. from the Western Maryland and 20 per cent. from the Baltimore & Ohio; and that the allotment of equal percentages to respondent did him full justice.

Reading the reports as part of the petition it shows that respondent received treatment equal to that of the Coal Company and, therefore, suffered no damages, and that he was not only properly limited to the amount of reparation awarded by the reparation order but, in fact, was entitled to no damages.

That being true, the petition, when read with the exhibited reports, showed that the respondent had no right

of action whatever, and the petition was inconsistent with and failed to support the judgment.

Upon the grounds stated in the petition and this brief we respectfully ask that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX.

RELEVANT PARTS OF IMPORTANT STATUTES.

Interstate Commerce Act, Sec. 8, USCA, Tit. 49, Ch. 1, Sec. 8; 24 Stat. 382:

> "8. Liability in damages to persons injured by violation of law.—In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Interstate Commerce Act, Sec. 9; USCA, Tit. 49, Ch. 1, Sec. 9; 24 Stat. 382:

> "9. Remedies of persons damaged; election; witnesses.—Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"

Interstate Commerce Act, Sec. 13; USCA, Tit. 49, Ch. 1, Sec. 13; 24 Stat. 383; 36 Stat. 550; 41 Stat. 484:

"13. Complaints to and investigations by commission.—(1) *Complaint to commission of violation of law by carrier; reparation; investigation.*—Any person * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Interstate Commerce Act, Sec. 16; USCA, Tit. 49, Ch. 1, Sec. 16; 24 Stat. 384; 25 Stat. 859; 34 Stat. 590; 36 Stat. 554, 1167; 38 Stat. 219, 41 Stat. 491, 492; 43 Stat. 633:

"16. Orders of commission and enforcement thereof; forfeitures.—(1) *Orders by commission for payment of damages.*—If, after hearing on a complaint made as provided in section 13 of this chapter, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"(2) *Proceedings in courts to enforce orders; costs; attorney's fee.*—If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

Interstate Commerce Act, Sec. 22; USCA, Tit. 49, Ch. 1, Sec. 22; 24 Stat. 387; 25 Stat. 862; 28 Stat. 643; 42 Stat. 827:

"* * * and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 526.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, PETITIONERS,

versus

A. SPATES BRADY, RESPONDENT.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

GEORGE M. HOFFHEIMER,
CHARLES R. WEBBER,
EUGENE S. WILLIAMS,
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Counsel for Petitioners.

The Daily Record Co. Print, Baltimore.

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A. SPATES BRADY, RESPONDENT.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

The petitioners stand on their petition for the writ and brief in support thereof, with the amendments and supplementary argument contained in this brief. The statement of facts is in the petition and by reference made part of the brief in support thereof.

In section I of the original brief, page 34, the reference to the attorney's fee should have been to Section 16(2) of the Interstate Commerce Act, which provides that "if the petitioner prevails he shall be allowed a reasonable attorney's fee." The carrier is also liable for the shipper's "costs of the suit." Section 8 previously cited is, however, the same in principle.

SUMMARY OF SUPPLEMENTAL ARGUMENT.

SUPPLEMENT TO SECTION I OF ORIGINAL BRIEF.

The statute provides for recourse to court only to collect the amount of the Commission's award. The history of Section 16 (2) so shows.

By express language originating in the Hepburn Act the complaint to the Commission in reparation cases is for the *recovery of damages*, while a petition to the court is for the *enforcement of an order* for the payment of money.

Neither the statute nor the decisions support respondent's contention that there is implicit in the statute a right of the shipper to a court review in reparation cases.

If respondent's contention that there is a court review is correct, several incongruous results ensue.

AMPLIFICATION OF PART OF SECTION V OF ORIGINAL BRIEF.

There was no discrimination against respondent, for he was offered the same car service that was given his competitor. It is mathematically demonstrated that allowance of 100 per cent. Western Maryland car service to respondent would have discriminated in his favor. That being true, the petition, when read with the exhibited reports, showed that the respondent had no right of action.

SUPPLEMENTARY SECTION.—THE QUESTIONS PRESENTED TO THIS COURT ARE SUFFICIENTLY RAISED BY THE RECORD.

Petitioners are not barred by failure of the record to show that the points raised were invoked in the district court.

The demurrers when filed sufficiently raised all questions in the district court under the Comformity Act.

There were general demurrers, and also demurrers specifically assigning as grounds that respondent's petition was for a sum in excess of the reparation order and also that the court as a court of law could not consider, review, revise or reverse the award.

If no demurrer had been filed the assignments of error sufficiently raised the points now urged.

A carrier is powerless to waive rights and defenses under a Federal statute. The local practice cannot affect the right nor the inability to waive defenses.

SUPPLEMENTAL ARGUMENT

SUPPLEMENT TO SECTION I OF ORIGINAL BRIEF.

In your petitioners' original brief, section I, beginning at page 25 thereof, it has been argued as follows:

The shipper's right of action and the district court's jurisdiction were limited in maximum amount to the sum awarded by the Interstate Commerce Commission's reparation order with interest, and the district court could not grant recovery of a greater amount.

Supplementing the argument in that brief, we add the following:

The statute provides for recourse to a court only to collect the amount of the Commission's award. The history of Section 16 (2) *so shows.*

A contention of the respondent is that a court review in reparation cases is in some way implicit in the statute. No statutory sanction exists. As far as we know there is no judicial sanction except the dicta of the statutory court in *Brady v. Interstate Commerce Com.*,

43 F. (2d) 847. The *Standard Oil case*, 283 U. S. 235, and similar cases already cited relating to reparation orders, *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, regarding valuation, *Piedmont & N. R. Co. v. United States*, 280 U. S. 469, regarding certificates of convenience and necessity, and *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522, 529, 530, referring to accounting, with their historical outline and numerous citations, negative the respondent's contention.

Section 16(2) in very much its present form (except as to the state court jurisdiction) came into the Interstate Commerce Act by way of the Hepburn Act (Act of June 29, 1906, 34 Stat. at L. 584, Section 5). The parts of Sections 4 and 5 of that Act, relating to injunctions and to reparation orders, are in the appendix to this brief. By these sections jurisdiction "to enjoin, set aside, annul or suspend any order or requirement of the Commission" was vested in the circuit courts. Sufficient of the history in the latter aspect is embodied in the following extract from *United States v. Los Angeles & S. L. R. Co.*, supra:

> "But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act. [Cases cited.] For the first nineteen years of the Commission's existence no order was so reviewable. The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the ratemaking power was conferred upon the Commission, and then disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, chap. 3591, Secs. 2-7, 34 Stat. at L. 584, 586-595, Comp. Stat. Secs. 8569, 8597, 8582-8585, 8592, 8604a, 4 Fed. Stat. Anno. 2d ed. pp. 406, 549, 457, 458, 493, 499. The first suit to set aside an order was brought soon after. Stickney v. Interstate Commerce Commission (C. C.) 164 Fed. 638,

215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, chap. 309, Sec. 1, 36 Stat. at L. 539; and, when that court was abolished, to the district courts, by the Urgent Deficiencies Act."

The jurisdiction "to enjoin, set aside, annul or suspend" an order, so conferred, was in marked contrast to the more limited jurisdiction over reparation orders which, as already stated, was contingent upon non-compliance by the carrier, and was essentially a jurisdiction to enforce them. This is clear from the whole tenor of Section 16 as created by Section 5 of the Hepburn Act. The last sentence of the paragraph of that Section 5, which conferred the jurisdiction, is especially clear. It read:

> "All complaints for the *recovery of damages* shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the *enforcement of an order* for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after." (Italics ours).

By the express language, therefore, a complaint to the Commission was "for the *recovery of damages*"; while the petition to the court was "for the *enforcement of an order* for the payment of money."

By the Commerce Court Act of June 18, 1910 (36 Stat. at L. 539), jurisdiction over "cases brought to enjoin, set aside, annul or suspend in whole or in part any order" was conferred on the Commerce Court. By the same Act, Section 16 was amended so as to give jurisdiction over actions for damages following non-compliance with a reparation order, not only to the circuit courts of the

United States but alternatively to "any state court of general jurisdiction having jurisdiction of the parties." The evident purpose of leaving the jurisdiction for the enforcement of reparation awards in the circuit courts and adding the state court jurisdiction, rather than to confer it on the Commerce Court, was to avoid any requirement that shippers from every part of the country resort to the Commerce Court.

By the Act of October 22, 1913 (38 Stat. at L. 219), abolishing the Commerce Court, its jurisdiction was transferred to the district courts and still remains there in substantially the same form. But no change was made in the reparation provision which originated in what is now Section 16(1), (2) and (3). Nor has there been subsequent amendment of that paragraph except in particulars immaterial here. The latter are in the Transportation Act of February 28, 1920 (41 Stat. at L. 491, 492) and the Act of June 2, 1924 (43 Stat. at L. 633).

The sentence already quoted from the Hepburn Act remains in almost the same language, but in altered arrangement, in Section 16(3) of the Interstate Commerce Act (USCA, Tit. 49, Ch. 1, Sec. 16(3), clauses (b) and (f)). The following are the clauses:

> "(b) All complaints against carriers subject to this chapter for the *recovery of damages* not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.
>
> "(f) A petition for the *enforcement of an order* of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after." (Italics ours).

In the existing statute, therefore, the proceeding before the Commission is still "*for the recovery of damages,*" while the court proceeding is "for the *enforcement of an order* for the payment of money."

In *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U. S. 654, 661, it was said to be "clear that the action is not on the award as such." (See *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430). But although not on the award as such, the action is yet "for the enforcement" of the order. By the intent of the statute the shipper endeavors to enforce the order to the full. The carrier, having the right of "contestation of all issues," as pointed out in the *Meeker case* and others, attacks the order. The Commission's findings of fact and order are prima facie evidence. The shipper has the right to introduce additional evidence to maintain the order. The carrier has the right to introduce evidence in attack on the order.

Again, if it be true, as respondent insists, that the action accorded the shipper by Section 16(2) following non-compliance by the carrier, entitles him to a so-called court review, as distinguished from judgment in enforcement of the Commission's order, the following incongruous results ensue:

1. The instance of reparation orders would be the only one in which a plaintiff may obtain a court review, with the objective of annulling an order of the Commission in a court of law. The whole history of interstate commerce legislation has confined the jurisdiction "to enjoin, set aside, annul or suspend" orders to courts of equity, except in the sole instance of the Commerce Court, which was in effect a court of equity, and did not possess any jurisdiction over reparation orders. The result would be in direct contravention of the *Standard Oil case*, 283 U. S. 235.

2. The power of judicial review, in all other parts of the statute confined to the Federal courts, would be conferred on the multitude of State courts, with the possibilities of varying or conflicting judgments as to the Commission's orders.

3. There would be conflict with Section 9 of the Interstate Commerce Act, quoted in the appendix to the original brief. A shipper may in some instances elect between a complaint to the Commission, and an action in a Federal district court. By the *Standard Oil case*, 283 U. S. 235, 240, it was said:

> "Section 9 of the Interstate Commerce Act * * * provides that a claim for damages against a common carrier may be brought before the Commission by complaint, or by an action in a federal district court of competent jurisdiction, but that the claimant or claimants 'shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.' Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking reparation upon the same claims by the alternative method of procedure."

See also *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 457; *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 290.

If after resorting to the Commission and obtaining a disappointing result there, the shipper could treat the Commission's order as a nullity, or procure its annulment in whole or part, by judicial action, he would, in effect, sue as if the order, to the extent of the annulment, had never been made, and as if he had never been before the Commission and had pursued his remedy in the court

in the first instance. The requirement of election would be useless. He might as well be relegated to suit in the first instance in every case.

4. Section 16(3)(f) provides that the petition "for the enforcement of an order of the Commission for the payment of money" shall be filed within one year. This clearly applies only to suits to recover the *amount of the award*. If suit can be brought to recover the greater amount claimed, rather than the amount of the award, as respondent contends Section 16(2) to permit, there is no time limitation for suit within the statute.

AMPLIFICATION OF PART OF SECTION V OF ORIGINAL BRIEF.

In your petitioners' original brief, section V, beginning at page 50 thereof, it has been argued as follows:

The respondent not only was limited in recovery by the amount of the Commission's award, but suffered no discrimination or recoverable damages.

It is desired to amplify the part of that argument contained in the last three paragraphs of page 51, as follows:

The petition, with the exhibited reports, does not show that the allocation of 20 per cent. by the Baltimore and Ohio and 80 per cent. by the Western Maryland was an undue or unreasonable preference or advantage to the Coal Company, nor subjected the respondent to any undue or unreasonable prejudice or disadvantage, nor unjustly discriminated against him. The petition and reports show that car service on the offered basis was as usable and relatively as valuable to respondent as to the Coal Company. He would have received from the better car supply of the Western Maryland, alleged in the peti-

tion (R. 4),* and the lesser car supply of the Baltimore and Ohio as high a percentage of his rating as given to the Coal Company. The allegation of his petition that he would have used 100 per cent. Western Maryland car service (R. 4), if permitted, establishes that he could have used his proportion of 80 per cent. from that company. The allegation that, while refusing the Western Maryland 80 per cent., he used the lesser Baltimore and Ohio supply (R. 4), establishes that he could also have used his proportion of 20 per cent. from that company. The petition and first exhibited report show that the relevant period was one of car shortage and that there was a market for all coal that could be produced (R. 3, 18).

The combined petition and first report show that the Commmission found that the basis of car distribution was arrived at to suit the business of the Coal Company, and that "similar treatment," therefore, demanded that respondent be given whatever basis of distribution he might elect, to suit his business, up to an aggregate of 100 per cent., with right to order the whole 100 per cent. from the Western Maryland (R. 6, 19, 20). But that report discloses that the carriers themselves fixed the basis to be applied to the Coal Company. This basis as to the Coal Company reflected the proportions of its past shipments via the respective roads. The carriers had to impose a restriction to prevent the Coal Company from ordering its full rating from both roads. The restriction imposed was reasonable under the circumstances, and in extending "similar treatment" to respondent, the other shipper similarly situated, it was the duty of petitioners to give the equal service of 80 per cent. from the

* Record references are to the page numbers of the transcript which was filed with the petition for the writ, being the marginal page numbers of the reprinted transcript.

Western Maryland and 20 per cent. from the Baltimore and Ohio. The benefit or advantage, whether to the Coal Company or to respondent, rested in the privilege of drawing from the better car supply of the Western Maryland. The avoidance of prejudice to the other shipper similarly situated with the Coal Company required that he be permitted to order an equal percentage of Western Maryland cars. The avoidance of prejudice also required that no shipper similarly situated be permitted to order from the Western Maryland more than the 80 per cent. allowed to the Coal Company.

A simple illustration suffices. Assume that the respondent and the Coal Company had an established rating of 20 cars per day for their respective mines, that the Baltimore and Ohio had available a 25 per cent. car supply and the Western Maryland a 50 per cent. supply. If restricted to the Baltimore and Ohio each would receive, upon ordering its or his full rating, 5 cars per day. If permitted to order on the full basis from the Western Maryland each would receive 10 cars. If limited to the basis of 80 per cent. from the Western Maryland and 20 per cent. from the Baltimore and Ohio, each would receive 9 cars. To have allowed the Coal Company 80 per cent. from the Western Maryland and 20 per cent. from the Baltimore and Ohio, would have given it 9 cars per day. To have restricted respondent at the same time to Baltimore and Ohio cars, or 5 per day, would clearly have constituted a preference of 4 cars to the Coal Company. To restrict the Coal Company to the 80-20 basis while allowing the respondent to obtain his whole supply, 10 per day, from the Western Maryland would have constituted a preference of one car in his favor. The extension to respondent of the 80-20 basis kept the two on a parity. Your petitioners offered to do this. The offer, though concealed in the petition itself, was not denied by

it. The offer was found by the Commission to have been made (R. 22), as the exhibited second report shows. As already pointed out in our original brief a pleading is to be construed the more strongly against the pleader.

If, as the respondent alleges, he would have ordered his entire supply from the Western Maryland, he would have received a substantial preference. The Commission's reports and order, sanctioning this preference, were in direct contravention of the statute.

Reading the reports as part of the petition the respondent received treatment equal to that of the Coal Company, and in legal contemplation, suffered no damage. The petition, therefore, showed that the respondent had no right of action. It was inconsistent with and failed to support the judgment.

SUPPLEMENTARY SECTION.—THE QUESTIONS PRESENTED TO THIS COURT ARE SUFFICIENTLY RAISED BY THE RECORD.

The respondent argued in the brief in opposition to the granting of the writ, that your petitioners are barred by failure of the record to show that the points raised here were invoked in the district court.

1. The Circuit Court of Appeals treated the points as properly raised, and decided most of them on the merits, according to its conception of the law.

2. As indicated in the petition for certiorari, page 9, your petitioners in 1930 demurred generally to the petition (R. 33, 34), which as the law then stood raised all questions as to the sufficiency of the petition. The law then prohibited special demurrers (Barnes' West Vir-

ginia Code of 1923, Ch. 125, Sec. 28; see *Cook v. Dorsey*, 38 W. Va. 196, 200). The Code provision read:

> "The form of a demurrer or joinder in demurrer shall be:
>
> " 'The defendant (or plaintiff) says that the declaration (or plea, etc.,) is not (or is) sufficient in law.' "

Despite that statute, your petitioners in 1930 also filed demurrers which assigned as grounds, among others, that the petition of the respondent was for a sum in excess of the Commission's award, and also that the district court, as a court of law, could not "consider, review, revise or reverse" the award (R. 33, 34). The demurrers were overruled after consideration by the court (R. 39).

3. The statute of West Virginia in effect when the demurrers were filed (Barnes' Code of 1923, Ch. 125, Sec. 29), provided in part:

> "If nothing be alleged by the demurrant in support of his demurrer, the court, if it overrule the same, shall state that fact in the order; and if final judgment be obtained in the cause by the party whose pleading is demurred to, the same shall not be reversed by reason of any defect in the pleading so demurred to."

That section applied only if the record showed affirmatively that nothing was alleged in support of the demurrer. Otherwise the sufficiency of the pleading demurred to was still open for review on all points under a general demurrer, assigning no specific grounds (*Koontz v. Koontz*, 47 W. Va. 31, 33; *Wm. Jones Sons v. Farley*, 71 W. Va. 173, 174).

4. The "Official Code of West Virginia, 1931," relied on by the respondent, became effective January 1, 1931,—

after the demurrers were filed. As by the law of West Virginia in effect when the demurrers were filed, they would have been sufficient to entitle the petitioners to a full review in the State Supreme Court of the question of the sufficiency of the petition in any aspect, they therefore raised the questions sufficiently in the district court under the Conformity Act. In *Hill v. Smith*, 260 U. S. 592, 594, which involved the Bankruptcy Act, and came to this Court from the Supreme Judicial Court of Massachusetts, it was said:

> "We deem it enough to say, as to the first, that the appellate court treated the question as open, and decided it; and as to the second, that here, as in *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265, though perhaps in a somewhat less intimate and obvious way, the burden of proof is so connected with the substantive rights given to the respective parties by the statute—indeed, so flows from the words of the statute—that the ruling upon it may be reviewed here."

5. By the Federal practice, even if no demurrer had been filed below, the assignments of error Nos. 1 and 61 in the Circuit Court of Appeals (R. 40, 63) sufficiently raised the points now urged (*Slacum v. Pomery*, 6 Cranch, 221; *Garland v. Davis*, 4 How. 131, 143; *New Orleans etc. R. Co. v. Morgan*, 10 Wall. 256; *Barth v. Clise*, 12 Wall. 400; *New Orleans Ins. Assoc. v. Piaggio*, 16 Wall. 378; *Baltimore & P. R. Co. v. Trustees of Sixth Presbyterian Ch.*, 91 U. S. 127; *Cragin v. Lovell*, 109 U. S. 194).

6. As the substantive questions in this case involve rights and defenses under a Federal statute, which a carrier is powerless to waive, the local practice could not affect the Federal right, nor the inability to waive defenses (*A. J. Phillips Tool Co. v. Grand Trunk W. R.*

Co., 236 U. S. 662, 664; *Kansas City Southern R. Co. v. Wolf*, 261 U. S. 133). And "a substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of practice" (*Norfolk S. R. Co. v. Ferebee*, 238 U. S. 269, 273. See also *Central Vermont R. Co. v. White*, 238 U. S. 507, 511-513; *Hill v. Smith*, 260 U. S. 592, 594; *New Orleans & N. E. Co. v. Harris*, 247 U. S. 367, 370-372).

Respectfully submitted,

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Baltimore, Md.,
January, 20, 1932.

APPENDIX.

Hepburn Act of June 29, 1906, 34 Stat. at L. 584:

"Sec. 4. That section fifteen of said Act be amended so as to read as follows:

"'Sec. 15. * * * All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. * * *'"

"Sec. 5. That section sixteen of said Act, as amended March second, eighteen hundred and eighty-nine, be amended so as to read as follows:

"'Sec. 16. That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"'If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the

petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this Act may be presented within one year.

* * * * * *

" 'The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. * * * ' ".

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Supreme Court of the United States

October Term, 1932.

No. 526.

THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, *Petitioners*,

v.

A. SPATES BRADY, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

GEORGE T. BELL,
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SAMUEL T. SPEARS,
Of Counsel.

THE J. W. STOWELL PRINTING COMPANY, FREDERALSBURG, MD.

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v.

A. SPATES BRADY, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

May it please the Court:

The unanimous opinion of the Circuit Court of Appeals in this case (written by Judge Parker and concurred in by Judges Northcott and Soper) is such an excellent statement of the questions involved and of the law applicable thereto that respondent adopts it as his main brief in opposition to the petition for certiorari filed herein. The opinion also contains a comprehensive statement of the facts which respondent refers to and adopts as his statement deemed necessary to correct inaccuracies and omissions in petitioners' statement. But nothing stated in or deducible from the opinion plus this adoption is to be taken as an admission that respondent

ever received or rejected a 20-80 offer tendered or concurred in by both railroads, or that the Coal Company was actually restricted to that basis in *receiving* cars.

The following argument will be confined for the most part to running comments on petitioners' contentions.

Summary of the Argument

I.

Respondent's Right of Action and the District Court's Jurisdiction were not limited in maximum amount to the sum awarded by the Commission's reparation order with interest, and the District Court could grant recovery of a larger amount.

1. This Court has sustained a greater recovery than the Commission's award (correctly computed) in one case, and has clearly intimated in other cases that a District Court has jurisdiction so to do in a Section 16 suit.

2. The decision of the Circuit Court of Appeals for the Fourth Circuit herein is not in conflict with those of the Circuit Courts of Appeals for the Ninth and Third Circuits in any way constituting a ground for certiorari. The expressions in the opinions of the latter courts were clearly *obiter dicta.*

3. Section 16 of the Act specifically provides that the suit on a reparation order *shall* proceed in *all* respects *like other civil suits for damages* with two, and only two, exceptions, neither of which limits recovery to the Commission's award; and the Courts are not at liberty to ingraft any additional exceptions.

4. The Circuit Court of Appeals' interpretation of Section 16 herein is entirely consistent with the fundamental principles of equality and uniformity which underlie the whole statute. A contrary interpretation would produce inequality, inconsistency and discrimination.

II.

The sufficiency of the petition to support the judgment is not open to attack by petitioners on the ground set forth in their brief, pp. 20-21, 35-41.

The petition complied with the statute, sued for a greater amount than the judgment, and nothing in the petition required any deduction from the amount sued for.

The action of the Commission in applying the mitigation-of-loss rule was beyond its powers, erroneous as a matter of law, and void.

1. Petitioners, having failed in their demurrers to raise any question regarding the sufficiency of the petition, are estopped from raising such a question after judgment.

2. In setting forth the causes for which respondent claimed damages and the order (including the reports made parts thereof) of the Commission in the premises, the petition complied with a requirement of the statute. But it did not thereby adopt the quoted findings or attached reports, or incorporate them for the purpose of cutting down the amount sued for.

3. The annexation of an exhibit to a pleading does not amount to an allegation that the statements and recitals therein are true and correct.

4. The petition put the railroads upon notice that respondent intended to attack the prima facie correctness of the Commission's findings as to the amount of his damages and to present additional evidence in support of his claim at the trial.

5. The verdict and judgment were for an amount considerably less than the amount sued for. There being no bill of exceptions in the record, it must be assumed that "the case was fairly and fully submitted in the charge of the judge to the jury" and that there was "testimony tending to show damages in at least the sum" awarded by the court.

6. While the same rules of law prevail in both Section 9 methods of procedure, the Commission has no more authority to pass upon the "reasonableness" of a shipper's acts as a basis for applying the mitigation-of-loss rule than has a District Court to pass upon the reasonableness of a carrier's practices as a basis for assessing an injured shipper's damages. The Commission's action in applying the mitigation-of-loss rule was beyond its powers.

7. The Commission's action in respect to the socalled 20-80 offer (assuming respondent received it and that it was concurred in by both roads) constituted a misapplication of the mitigation-of-loss rule and was erroneous as a matter of law in numerous respects, towit: (a) the offer was arbitrary, without regard to respondent's business and unlawful, hence respondent was not bound to accept it; (b) it was equally within the power of the railroads to make effective the expedient which the Commission found respondent should have adopted; (c) respondent did all the rule required by ordering cars from both roads and accepting all cars furnished by both roads; (d) respondent's acceptance of the offer would have worked an estoppel against him; (e) as there were no Western Maryland rates in effect from respondent's mine, that road having refused to publish them, respondent was not required to accept any 20-80 offer unless and until such rates were published; and (f) as the railroads' refusal to accord respondent his rights in the premises was not accidental, unforeseen or mere negligence on their part, but a continuous tort and violation of statutory duty, the mitigation-of-loss rule was not applicable in any event.

III

The assailed acts and practices of the railroads presented questions administrative in character, consequently the Commission's finding that they were in violation of the Act and its prescription of the standard that should have prevailed were necessary prerequisites to maintaining any action for damages.

The petition shows that the Commission decided these questions and prescribed the standard. Its action thereon is conclusive.

The promulgation of the Commission's finding and standard was delayed beyond the two-year period of limitation, thus making impossible any voluntary election of Section 9 remedies. Respondent was compelled to proceed before the Commission or not at all. A construction of Section 16 that in such cases the injured shipper is limited in maximum recovery to the Commission's award would be unjust and deprive the shipper of his statutory and property rights.

1. The basic question before the Commission was one of mine classification for purposes of car distribution and was within the exclusive jurisdiction of the Commission. Respondent was therefore compelled to resort to that tribunal in the first instance.

2. It was not necessary for the petition to state "how or why the Commission reached its conclusion" that the acts and practices of the railroads were unduly prejudicial. "This Court has no concern with the correctness of the Commission's reasoning" with respect to matters within its administrative jurisdiction.

3. The Commission decided that the railroads should have accorded respondent the rights and privileges of a two-railroad or "joint" mine. The fact that the Commission decided the administrative question one way rather than another, or prescribed one standard rather than another, does not render the question presented any the less administrative.

4. The Commission's finding of undue prejudice and its prescribed standard of service that should have prevailed at respondent's mine are conclusive on the courts.

5. Respondent, compelled to proceed before the Commission, proceeded as the statute provides, secured a reparation order which petitioner's elected to refuse to pay, and then filed suit thereon and secured judgment for an amount which, although greater than the Commission's

award, was much less than that body's computation of his damages. To hold now, by a strained construction of Section 16, that in such cases the maximum permissible recovery is the Commission's award would be flagrantly unjust. The Court has held that it is bound to give heed to the rule that where a particular construction of a statute will occasion injustice, it is to be avoided if another and more reasonable interpretation is present in the statute. By the plain language of Section 16, the more reasonable interpretation of the Circuit Court of Appeals is abundantly present in this statute.

IV

The questions whether Respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's award are res judicata, having been determined by the decree in Brady v Interstate Commerce Commission, 43 Fed.(2) 847, affirmed Brady v United States, 283 U. S. 804.

1. Every element necessary to and justifying the application of *res judicata* is present in this case.

2. The question of irreparable injury was a distinct issue in the equity proceeding, and the special court's decision that it was without jurisdiction "for the reasons stated", one of which was that no irreparable injury is to be apprehended from reparation orders and that errors therein may be corrected in the Section 16 suit, was addressed to that issue, and was not *obiter dicta*.

3. The fact that, insofar as the present record shows, *res judicata* was not pleaded is immaterial. The two actions were carried on simultaneously in the same District Court.

4. The memorandum opinion of this Court affirmed the decree of the special court and thereby sanctioned the result and effect of that court's determination of the foregoing questions upon the present case, even though the citations appended to the opinion may indicate that

this Court travelled a different route part of the way in reaching the common goal.

5. Even though the special court's determination of the foregoing questions was reached upon an erroneous view of the law or by an erroneous application of the law, nevertheless it may not be disputed in the instant case.

ARGUMENT

I

Respondent's right of action and the District Court's jurisdiction were NOT limited in maximum amount to the sum awarded by the Interstate Commerce Commission's reparation order with interest, and the District Court COULD grant recovery of a greater amount.

1. While this Court has never directly and specifically decided the precise question as above stated, it has sustained a greater recovery than the Commission's award correctly computed. *Pennsylvania R. Co. v. Weber,* 257 U. S. 85, 91 (in connection with *Same v W. F. Jacoby Co. v P. R. Co.,* 242 U. S. 88, 91). In the latter case, the plaintiff sued for, and recovered, the amount of the Commission's award with interest. Upon appeal this court was convinced ("almost mathematically certain") that the Commission had used a wrong basis in calculating the amount of its award; the award would have been automatically smaller if the correct formula had been applied to the basic figures from which the award was computed. 242 U. S. at pp. 94-7. For the trial court's refusal to charge the jury in respect to the matter, the judgment was reversed and the case remanded. At the new trial, the plaintiff introduced the record before the Commission and a great deal of other evidence, and again verdict and judgment were for the amount of the Commission's award with interest. 263 Fed. 945, 946, 948; affirmed 269 Fed. 111, 114. The case was again brought to this Court (*Weber Case, supra*) where the judgment was affirmed notwithstanding the "inescapable conclu-

sion" that the commission had used a wrong basis in arriving at the amount of its award. *This is a clear case where the recovery permitted was greater than the Commission's award would have been if computed on the correct basis. It is a clear case where the amount sued for was greater than the Commission's award correctly computed,* and this Court's affirmance of the judgment for the greater amount is therefore a persuasive precedent for the Circuit Court of Appeals' conclusion on that question here.

In at least three other cases, this Court has clearly intimated that a District Court has jurisdiction to give a greater recovery than the Commission's award. *Pennsylvania R. Co., v Clark Bros. C. M. Co.,* 238 U. S. 456, 472-3; *Louisville & N. R. Co. v Ohio Valley Tie Co.,* 242 U. S. 288, 291; *Meeker & Co. v L. V. R. R. Co.,* 236 U. S. 412, 430. In the first of these cases, the plaintiff went into a state court while its claim was still pending before the Commission and secured judgment for $41,181 trebled, or a total of $124,443. Shortly thereafter, the Commission promulgated its report and, out of a claim for $36,401.12, awarded only $31,127.96. See 23 I. C. C. p. 191. This report was brought to the attention of this Court (p. 463), and the quite large discrepancy between the claim, judgment and award should be borne in mind in considering this significant excerpt from the opinion—

> In the situation in which the plaintiff stood after the Commission's finding, that *statute* determined the *extent* of the damages it was entitled to recover with respect to interstate sales and shipments, * * * *This is not to say that the finding of the Commission as to the amount of the damages has any other effect than that prescribed in Section 16 of the Act.* (See note)*

*Unless otherwise stated, these and other italics in the brief have been supplied.

In the *Ohio Valley Tie Case, supra,* the plaintiff secured an order from the Commission for $6,198 as reparation for unreasonable rates, and then instituted suit and secured judgment in a state court for over $50,000 for general damages arising out of the same transactions but not, as alleged, included in the Commission's award. Payment of the order had been offered to and accepted by the plaintiff, consequently this Court held that all damages attributable to the overcharges (unreasonable rates) "must be taken to have been considered in the award of the Commission and compensated when that award was paid", and reversed the judgment. Of course when a reparation order is complied with and payment accepted, as when the judgment order of a court is satisfied and payment acknowledged, no further proceeding in respect to the transactions covered by it may be maintained in any tribunal. But the true significance of the opinion insofar as the instant case is concerned lies in the fact that this Court, after pointing out that Section 16 provides that if the carrier does not comply with a reparation order in due time the complainant may sue in a state court, then indicated that the trial court would not be limited by the amount of the Commission's award. It said—

> The decisions say that *whatever the damages were they could be recovered* (citing cases); and that the statute determines the extent of damages (citing the *Clark Bros. Case, supra*).

The citation of the *Clark Bros. Case* in support of the holding that the statute determines the *extent* of the damages recoverable in a Section 16 suit is particularly significant, for there this Court followed a similar holding with the observation that the reparation order pursuant to which the suit is instituted has only the quality of *prima facie* evidence.

2. Petitioners contend (brief p. 19, 27) that the decision of the Circuit Court of Appeals for the Fourth Cir-

cuit is in conflict with decisions of the Circuit Courts of Appeals for the Ninth and Third Circuits. The cases cited are *Chicago, B. & Q. R. Co., v Fentuch,* 191 Fed. 482, 486, and *Western N. Y. & P. R. Co., v Penn Ref. Co.,* 137 Fed. 343, 363. There are expressions in these opinions to the effect that the maximum limit of recovery in a Section 16 suit is the amount of the Commission's award with interest, but in both of them the Commission's award with interest was the amount sued for, hence the expressions referred to were *obiter dicta,* and constitute no basis for granting certiorari herein. *Fentuch Case,* p. 483; *Penn Ref. Case,* p. 347.

Nor is there any conflict between the decision of the Circuit Court of Appeals in this case and those of the other Federal Courts in the cases cited on page 33 and elsewhere of petitioner's brief. In each and all of those cases (except *Powers v Cady,* 9 Fed. (2) 458, wherein no order of the Commission was involved), including *Standard Oil Co. v United States,* 283 U. S. 235, 240, the plaintiffs asked the courts to which they resorted after the Commission had denied them relief to substitute their judgment for that of the Commission upon purely administrative questions of fact committed by law to the exclusive jurisdiction of the Commission. On the other hand, the respondent here made no attack upon the Commission's finding of undue prejudice or upon the standard of service which it found should have prevailed; he did not ask the District Court to exercise any administrative authority whatsoever.

Nor can petitioners get any comfort out of the alleged "implication" in the short excerpts from the opinions of this Court in the cases cited on pages 31-2 of their brief. The reason why this Court referred to the prima facie clause in Section 16 as "cutting off no *defense*", leaving every opportunity "to the *defendant* to contest the claim", and being "open to contradiction by the *carrier*", etc., is obvious. The Court was there passing upon contentions of carriers; it made specific reference to "carriers" and "defendants" merely to emphasize its conclusion that the contentions which they were addressing to the Court were without merit.

3. Petitioners contend (brief p. 28) that "by the plain language of Section 16 suit can be brought by the shipper only if the carrier refuses to pay". By like "plain language" he may recover the FULL amount of his damages, whether more or less than the Commission's computation thereof, if the carrier *does* refused to pay. And petitioners refused to pay in this case. If Congress had intended to limit recovery to the Commission's award, its intention so to do would not have been left to inference and speculation, but would have been clearly expressed. It certainly would not have provided that the suit *shall* proceed in *all* respects *like other civil suits for damages,* if it had intended to limit recovery to the Commission's award. It certainly would not have limited its sole exceptions to this general language to two, towit, (a) that the findings and order of the Commission shall be prima facie evidence only and (b) that the plaintiff shall be relieved of court costs, etc., if it had intended to add a third exception, towit, (c) that the maximum permissible recovery shall be the amount of the Commission's award. When an exception is incorporated in a statute, it excludes all others than the one expressed, and the courts are not at liberty to ingraft other exceptions. *Expressio unius est exclusio alterius. Kendall v. United States,* 107 U. S. 123; *Ford v. United States,* 273 U. S. 593, 611.

The language of the statute defining the shipper's rights if the carrier refuses to pay is clear and plain, hence the well established rule that the language *must* be taken as the final expression of the legislative intent is applicable. *Caminetti v United States,* 242 U. S. 470, 485; *Hamilton v Rathbone,* 175 U. S. 414, 419; *United States v Missouri P. R. Co.,* 278 U. S. 269, 278. In the last cited case, wherein an order of the Commission based upon an erroneous construction of the Act was involved, this Court said—

> We are therefore bound by the words employed and are not at liberty to conjure up conditions in order that resort may be had to construction. It is ele-

mentary that where no ambiguity exists, there is no room for construction.

Even if there were room for construction, this Court would be faced with the fact that the Act is a remedial statute and should therefore be broadly construed. *New York, N. H. & H. R. Co. v Interstate Commerce Commission,* 200 U. S. 361, 371. This is equally true of its reparations provisions. "The provisions of the Act giving redress, compensatory in its nature, to persons sustaining pecuniary injury through violation of public duty by the carrier, must receive a liberal and not a narrow interpretation". A claim for damages under the Act is a "claim not for a penalty but for compensation, (and) is a property right." *Spiller v Atchison, T. & S. F. R. Co.,* 252 U. S. 117, 135.

4. Petitioners contend (brief p. 34) that to subject the carrier refusing to pay a reparation order to the risk of being compelled to pay a larger amount "would permit the discrimination which the whole Act intends to prevent, by discarding the limit in favor of the shipper who sues and insisting on it by payment to the others." But the same result may be accomplished by paying the order in favor of one shipper and successfully resisting it in favor of a competitor; or of putting up a stronger defense against one shipper than against his competitor in the same or a different suit; or of satisfying the claim of one shipper before hearing and successfully resisting his competitor's Section 16 suit on a reparation order.

The Circuit Court of Appeals' view of this jurisdictional question is entirely consistent with the principles of equality and uniformity which underlie the statute. By giving the injured shipper the right to pursue only one of two exclusive remedies for violations of the Act which require the administrative ruling of the Commission to determine them, Congress certainly intended that each of the two was to comprehend whatever measures are necessary to secure recovery of the statutory standard of full compensation vouchsafed in Section 8, and

further that each was to be as adequate and complete as the other. This is so because the principles of equality and uniformity permeate Section 9 no less than the other provisions. Pursuant to this view, this Court has literally read into the Act that whether complaint is filed with the Commission or suit is brought in court, the same period of limitation applies (*A. J. Phillips Co. v Grand Trunk R. Co.*, 236 U. S. 662, 667), and the same starting basis, a finding by the Commission on the administrative question, is required (*Mitchell Coal & C. Co., v P. R. Co.*, 230 U. S. 247, 258).

But if both methods of procedure are to be controlled by the same rules of law and hence to culminate in like final results, they must be construed as subject also to the same judicial machinery for correcting errors and mistakes. Having erected a guide post directing shippers to use either of two Federal-aid highways to reach a common goal, Congress certainly did not intend to leave one of them without a bridge over the "river of errors and mistakes". Therefore, the Section 16 suit pursuant to a reparation order must be regarded as merely a *de novo* step in the Section 9 "method of procedure" before the Commission and as part and parcel of that particular "remedy"; and must be construed to furnish means for correcting the errors of that body as effectively as do the appeal and new trial in the District Court for correcting the errors of that alternative tribunal. If two competing shippers, having secured the same finding of the Commission on the administrative question, seek recovery of damages, one by an action in the Federal Court and the other by complaint to the Commission, the fundamental principles of equality and uniformity which this Court has repeatedly held underlie the whole statute require that the errors of the two trial tribunals shall be corrected by the same judicial machinery.

It is true that Section 16 does not expressly provide that suit may be instituted in court where the injured shipper is dissatisfied with the Commission's order as well where the carrier refuses to comply with it. But neither does that section expressly provide that the two-year period of limitation referred to therein shall apply to initial actions for damages in the courts. Nor does

Section 9 expressly require an administrative finding by the Commission as a condition to pursuing the remedy in a Federal Court. These things are only implied. As before indicated, they have been read into the statute in order to make it a consistent whole and to insure equality and uniformity. "In other words, the Act cannot be held to destroy itself." *Texas & P. R. Co. v Abilene Cotton Oil Co.*, 204 U. S. 426, 436-7, 441-2. If not, then the Circuit Court of Appeals' opinion herein as to the scope of the Section 16 suit must be upheld. The same fundamental reasons call for the corrective aid of the courts to perfect the method of procedure before the Commission as for the preliminary administrative power of the Commission to initiate the alternative method of procedure in a Federal Court.

II.

1. The sufficiency of the petition to support the judgment is not open to attack by petitioners on the ground presented on pages 20-21, 35-41, of their brief.

2. The petition complied with the statute, sued for a greater amount than the judgment, and nothing contained in the petition required any deductions from the amount sued for.

3. The Commission's application of the mitigation-of-loss rule was beyond its powers, erroneous as a matter of law, and void.

1. The petition prayed judgment for the full amount of respondent's damages, or for a greater amount than the judgment and a greater amount than the Commission's award with interest. The West Virginia Code, 1931 (Chap. 56, Art. 4, Sec. 36)—provides that—

> "All demurrers in civil cases shall be in writing and shall state specifically the grounds of demurrer relied on, and no grounds shall be considered than those so stated, except by the court of its own accord, but the demurrant may, by leave of court, amend his demurrer by stating additional grounds, or otherwise, at any time before the trial at law or final hearing in equity".

Furthermore, it had been held as long ago as 1899 by the supreme court of that state that "a pleading when presented is presumed to be sufficient and it is the duty of a demurrant if he thinks it insufficient and desires to take advantage of it, at least to call the attention of the court to the defects or imperfections in such pleading". *Koontz v. Koontz,* 47 W. Va. 31, 34; 34 S. E. 752.

The only grounds "specifically" stated in petitioners' demurrers in this case were that the demand or claim asserted in the petition was for an amount largely in excess of the Commission's award and that the plaintiff (respondent here) "had no right of action to cause the court, and the court no jurisdiction, to consider, review, revise or reverse" the Commission's award (33-4).* These grounds challenged the jurisdiction of the court, not the sufficiency of the petition. They contain no reference to the objection presented on pages 20-21, 35-41, of petitioners brief herein, to wit, that the petition, while in form praying recovery of a greater amount than the Commission's award and one sufficient to cover the judgment, in substance and effect shows that respondent suffered damages only to the extent of the Commission's award with interest. As petitioners did not raise this objection before the trial, they are estopped from raising it after judgment. Their failure to raise it *specifically* in their demurrers was tantamount to a waiver of the point.

2. In setting forth the causes for which respondent claimed damages and the order of the Commission in the premises (including the reports made parts of the order, rec. 31), the petition complied with a requirement of the statute. Section 16; *Vicksburg, Shreveport & P. R. Co. v. Anderson-Tully Co.,* 256 U. S. 408, 415. In quoting the mitigation-of-loss and average loading findings and challenging their correctness, the petition put the railroads upon notice that respondent intended to attack their

*Unless otherwise specified, figures in parentheses refer to pages of the printed record.

prima facie validity and to present additional evidence in support of his claim at the trial. The petition did not adopt the quoted findings and attached reports in any respect whatsoever; it did not incorporate them in the petition for the purpose of cutting down the amount sued for. The annexation of an exhibit to a pleading does not amount to an allegation that the statements and recitals contained therein are true and correct. *Sweeney v Johnson*, 130 Pac. 997, 998. In *Lockhart v Leeds*, 195 U. S. 427, 434, it was said—

> "We entirely agree with the court below that the facts constituting the cause of action * * * must be distinctly alleged, so that the defendant may know what he has to meet, and so that he may, if he chooses, put them in the issue. The rule must receive a reasonable interpretation, and must be so enforced as to further, and not obstruct, the administration of justice."

See also *Swift & Co. v United States*, 196 U. S. 375, 390.

(a) The petition prayed judgment for $57,735.11 with interest from April 1, 1923, or a total of about $85,602.00 to the date of the judgment order; the judgment was for $63,048.60 with interest, or a total of about $63,363.00 to the date of the judgment order. There is nothing in the petition which required any deductions from the amount sued for.

Petitioners contend (brief p. 36) that the petition did not attack the assailed findings "on the ground that they were not established facts". It attacked them on the ground, among others, that they were void and this Court has held that a finding "contrary to the indisputable character of the evidence" is void. *Interstate Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 91-92. The mitigation-of-loss finding quoted and attacked in the petition shows that the socalled "20-80 offer" was the basis for the finding (7), but the petition also shows that respondent placed written orders for cars with the West-

ern Maryland which that road refused to honor on any basis (4), and thereby shows that although these orders were the legal equivalents of tenders of freight (*Rules Governing Ratings of Coal Mines*, 95 I. C. C. 309, 311), the Western Maryland made no "offer" to transport the freight by placing cars for loading at respondent's mine. The petition further shows that the Western Maryland rate schedules did not cover respondent's mine (3), and thereby shows that that road refused to put itself in a position to make or join in a legal "offer" of transportation and cars, 20-80 or otherwise, to respondent. Sections 6 (7) and 1 (3) of the Act.*

Furthermore, the average loading finding quoted and attacked in the petition shows that 50 tons was used in the rules in determining the daily *rating* of a mine expressed in cars and in those governing the *distribution* of cars to coal mines (7), but neither the petition proper nor any Commission finding quoted or referred to therein shows that after the cars were distributed any rules whatsoever provided that 50 tons per car was the maximum *loading* permitted therein. Indeed, the petition proper shows that petitioners themselves urged respondent to load all cars received "as heavily as possible", the period involved having been one of coal-car shortage, and that pursuant thereto respondent loaded the cars he received to an average of 53.55 tons per 50-ton car (5).

(b) Now taking the Commission's reports attached as exhibits as incorporated in the petition, Exhibit A states that "defendants *contend(ed)* that complainant was offered the same arrangement but he declined and cannot therefore be heard to complain", and that "whether or not this is true and whether or not similar service was in fact offered complainant depends upon surrounding circumstances" (15). Among other "surrounding circumstances" appearing on the face of the report are that

*These sections provide that no carrier may engage in transportation unless and until it has schedules of rates on file, and "transportation" includes the furnishing of cars.

the trackage agreement covered the Coal Company mines only (12-13); that in the *latter* part of October, 1922, (the period involved began October 14, 1922), respondent applied to the president of the Western Maryland for service via that road and his application was denied (17); that the paper 20-80 offer came from the Baltimore & Ohio, not both roads (18 bottom of page); and that the ultimate finding and conclusion of the Commission was that "the acts and practices of defendants whereby they accorded Maryland (Western Maryland) service to the mines of the West Virginia Coal & Coke Company * * * *while failing to accord similar service to complainant's mine* located intermediate thereto resulted in undue prejudice to complainant" (20).

Exhibit B states that at the hearing on the amount of damages a witness for respondent denied that his mine was offered the 20-80 basis, and while it further states that the contrary is shown by testimony of the same witness at the first hearing, "questions with regard thereto were thus raised to be passed upon by the jury in the light of the evidence" (97).

This exhibit B further shows that respondent accepted and loaded all cars furnished by both railroads and hence shows that he accepted each and every real offer of transportation made by either or both railroads (24).

(c) Petitioners contend (brief p. 37) that "the verdict and judgment could not have been arrived at without inclusion of at least the greater part of the damages which could have been avoided by acceptance of the offered car supply; and that therefore the petition does not support the judgment and the judgment is erroneous". But they point to no allegation in the petition proper or finding in the Commission's reports attached thereto that respondent ever rejected any "offered CAR SUPPLY" whatsoever. On the contrary, the petition proper shows that respondent accepted and loaded all the cars he received from both railroads (5); the Commission's report attached as Exhibit B to the petition shows that respondent accepted and loaded all cars furnished to him by both railroads (24); and the Circuit Court of

Appeals found that "he accepted all cars tendered him by both railroads" (98).

Petitioners point (brief pp. 37-9) to delimited portions of the opinions in *Pennsylvania R. Co. v. Jacoby*, 242 U. S. 89, 99, and (second appeal) *Same v Weber*, 257 U. S. 85, 86, 91, and argue therefrom that the amount of the verdict and judgment in the instant case was "unattainable except by inclusion of the amount which the Commission had disallowed as resulting from refusal to accept the offered car supply", and that this "renders the conclusion inescapable that the judgment included this amount". This was the case where the recovery permitted was greater than the Commission's award if correctly computed. The judgment was affirmed because it was supported by other evidence than the Commission's award, this Court saying (257 U. S. at p. 91):—

> "Under the circumstances here shown, when the case is fairly and fully submitted, as it was in the charge of the judge to the jury, giving a correct basis upon which there might be a recovery of damages, and there is testimony tending to show damages in at least the sum awarded by the Commission, there is no prejudicial error because of the erroneous calculation of the Commission which was the basis of the award."

The record in the instant case contains no bill of exceptions, a fact for which petitioners themselves are responsible. *Brady v Baltimore & O. R. Co.*, 56 Fed. (2) 231, 234. Accordingly, it must be assumed here that the trial proceeded in all respects as the statute requires, that the trial judge correctly determined all questions presented to him, that he properly charged the jury, that the verdict was fully justified by the evidence, and that the trial judge was justified in using the verdict as the basis for the judgment. In other words, it must be assumed here that "the case was fairly and fully submitted * * * in the charge of the judge to the jury", and that there was "testimony tending to show damages in at least the

sum" awarded by the jury, which was considerably less than the amount sued for *and also considerably less than the Commission's computation of respondent's damages plus interest.*

3. At this point, it will be assumed (but not conceded) that the reports were incorporated in the petition for all purposes, that respondent actually received and rejected the "20-80 offer", and that it was concurred in by both roads. Respondent contends that the Commission's quasi-judicial action in applying the mitigation-of-loss rule was (a) beyond its powers and (b) erroneous as a matter of law.

(a) As a basis for applying that rule, the Commission undertook to regulate respondent's private business, to pass judgment upon his conduct in respect to the 20-80 offer, and to determine whether his rejection of the offer was "reasonable" (7, 28-9). The Commission has no such power. It is a body of limited jurisdiction charged with the enforcement of a statute which applies to carriers, not shippers. The Act sets up numerous standards for the operations of carriers—their acts and practices must be reasonable and not unduly discriminatory; it sets up no standards whatsoever for the acts and practices of shippers. The Commission has no common law or equity jurisdiction, and no power to enforce rules of standards not found in the Act. As said by the Commission itself in a leading case *(State of New York v N. Y. C. R. R. Co.,* 95 I. C. C. 119, 141)—

> "Our jurisdiction differs in two important respects from that of the courts. It is purely statutory, *and it is unilateral.* Parties are not before us on equal terms. We may entertain complaints by shippers against carriers, but not by carriers against shippers. We may not consider cross-complaints or counter claims, or setoffs, by defendant carriers against complaining shippers."

This is the first and only case in all the 45 years' history of the Commission that it has applied the mitigation-of-loss rule.

Consider the question from another standpoint. While acting in its administrative capacity, the Commission held that the acts and practices of petitioners were in violation of the Act and laid down the lawful standard that should have prevailed, towit, that respondent—

> "should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 percent of the rating of his mine as his judgment dictated, and cars should have been accordingly furnished in conformity with the supply of cars on the respective roads."

Pursuant to the further hearing granted for the sole purpose, not of reconsidering, revising or amending this standard, but of determining the amount of respondent's damages based upon that standard (20, 6), the Commission now acting in its quasi-judicial capacity proceeded to make a retroactive application of the very acts and practices which, in its administrative capacity, it had found unlawful. In its administrative capacity, it held that carriers may not by withholding their equipment and facilities dictate or control the markets which a particular shipper may seek or enjoy (19); but in its quasi-judicial capacity, it held that they may do so to the extent contemplated by the 20-80 offer. In its administrative capacity it held that respondent should have been permitted to divide his cars and shipments as his judgment dictated (20); but in its quasi-judicial capacity, it held that he should have submitted to the arbitrary dictation of the railroads. In its administrative capacity it held that the 20-80 offer was arbitrary, not on a basis of equality between shippers, and unlawful (18, 20); in its quasi-judicial capacity, it resorted to it as a basis for applying the mitigation-of-loss rule. Its quasi-judicial action was wholly inconsistent and incompatible with

its previously-prescribed administrative standard and tantamount to a violation of that standard.

Once the Commission finds a rate, rule, regulation or practice in violation of the Act and fixes the lawful standard, that standard is conclusive whether it relates to the past, present or future. It is the same as though the standard had been incorporated in the statute; having been fixed pursuant thereto, it is to all intents and purposes a part of it and therefore binding upon the carriers and also the Commission. *Mitchell Coal & C. Co. v. P. R. Co.*, 230 U. S. 247, 258; *Arizona Grocery Co. v Atchison, R. & S. F. R. Co.*, 284 U. S. 370, 389.

But petitioners argue (brief, pp. 21, 39) that the measure of damages in a reparation proceeding in a court and before the Commission are the same and, as a court may apply the mitigation-of-loss rule, so may the Commission. In support of this contention, they refer to *Louisville & N. R. Co. v Ohio Valley Tie Co.*, 242 U. S. 288, 290, and quote therefrom partly as follows —

> "By section 9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover the damages for which the carrier is liable under the Act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other."

Observe that the Court held that the rule of damages in one *method of procedure* hardly can be different from that proper for the other *method of procedure*. The Section 16 suit pursuant to a reparation order is a step in and part of the "method of procedure" before the Commission referred to in Section 9. The recoverable measure of damages in this combination method of procedure is the same as that in the alternative District Court method, but this does not mean that each of the two parts of the combination method does not have its own peculiar function. The function of the Commission

part is to determine "the FULL (not the NET) amount of damages sustained in consequence of any such violation of the provisions of this Act" (Section 8), and leave to the Section 16 part the determination of any off-setting amount resulting from the shipper's failure to comply with the rules or standards outside the Act.

There is a precedent for the foregoing concept of the Commission method of procedure. Section 9 provides for two alternative methods for the recovery of damages, one of which is by suit in a District Court, but this Court has held that with respect to what may be termed administrative causes of action no court has jurisdiction of a suit against an interstate carrier for damages resulting therefrom until the Commission has first declared the rates, rules or practices complained of to have been in violation of the Act. *Abilene Cotton Oil Co. v T. & P. Ry. Co.*, 204 U. S. 426, 436; *Mitchell Coal & C. Co. v P. R. Co.*, 230 U. S. 247, 257. It follows that with respect to such causes of action the District Court method of procedure also consists of two parts, each with its special function to perform. *The Commission has no more authority to pass upon the "reasonableness" of a shipper's acts and practices as a basis for applying the mitigation-of-loss rule or any other standard outside the Act, than has a District Court to pass upon the "reasonableness" of a carrier's acts and practices or any other standard within the Act as a basis for assessing an injured shipper's damages.*

(b) The Commission's quasi-judicial action in respect to the 20-80 offer constituted a misapplication of the mitigation-of-loss rule and was erroneous as a matter of law.

In the first place, while a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss, "the duty of the injured party is limited by the rules of common sense and fair dealing; he is not required to take such action as might under the circumstances be imprudent and impracticable." 17 *Corpus Juris* 767-770). "The amount of care required is

not to be measured by *ex post facto* wisdom, he is not bound at his peril to know the best thing to do." *Sedgwick on Damages* (9th Ed.) Sec. 221. Here, the Commission's report (Exhibit B) shows on its face that respondent sold his coal on the open market; he did not know more than a day in advance where his coal was going (16, 18-19). Indeed, the Commission specifically found that the 20-80 offer was arbitrary and without regard for the requirements of respondent's business (20). In such circumstances, no prudent shipper would have submitted to the conditions fixed by the railroads after conference with the shipper's competitor, and agreed to order his cars day after day, regardless of market or car supply conditions, on a fixed and unchangeable percentage basis. Assuming that the Western Maryland car supply and markets were better than the Baltimore & Ohio car supply and markets when respondent received this 20-80 "offer", there could be no assurance *at that time* that such would continue to be the fact for an indefinite time in the future. Respondent's rejection of the offer was therefore entirely reasonable, while that which was demanded of him was unreasonable and unjust. *Tubular Rivet & Stud Co. v Exeter Boot & Shoe Co.*, 159 Fed. (C. C. A.) 824, 830-1; *Northern Colorado Irr. Co. v Pouppert*, 127 Pac. 125, 128.

Next, the Commission's report (Exhibit B) shows that respondent filed written orders for his rating of cars with both railroads (22). There was nothing to prevent them from complying with these orders on the 20-80 basis. It was within their power to make effective the very expedient which the Commission found respondent should have adopted. Where he whose duty it is primarily to fulfill a contract and to prevent damages which may result from a failure has equal opportunity to fulfill the obligation, he alone may be depended upon to perform the duty, and it will not avail him to say the injured party might have performed the duty for him and thus lessened the damages. 17 *Corpus Juris* 774.

Next, the Commission's report (Exhibit B) shows that respondent did all that the mitigation-of-loss rule required of him; he ordered a 100 percent supply of cars from the Western Maryland, but since that carrier would not honor his requisitions he also placed his orders with the Baltimore & Ohio (22), *and further that he accepted and loaded all CARS actually furnished him by both railroads* (24).

Next, respondent contends that the plaintiff in an action for damages is under no obligation to accept a method of reducing his loss which might be construed as an abandonment of his claim or be likely to work an estoppel against him. *Campfield v Sauer*, 189 Fed. 576, 579; *Everett v Emmons Coal Mining Co.*, 289 Fed. (C. C. A. 4) 686, 691. If respondent had acceded to the so-called 20-80 offer and then appealed to the Commission for relief, that body would very likely have dismissed his complaint on the ground that no violation of the Act had been shown. See *Reeves Coal Co. v Chicago, M. & St. P. R. Co.*, 37 I. C. C. 707, 708.

Next, respondent contends that as there were no Western Maryland rate schedules in effect from his mine, that road having refused to publish and file them, he was required by no rule of law to accept a so-called offer which compelled him to sell 80 percent of his output for delivery via that road, and the Commission was wholly unjustified in using the rejection of such an offer as a basis for applying the mitigation-of-loss rule. Furthermore, the 20-80 offer itself, not having the backing of duly-published rates or the authority of applicable rules, was illegal and void.

Lastly, respondent shows that petitioners' persistent refusal to accord respondent's mine a two-railroad status and to permit it to divide its orders for cars to and ship its coal via either or both roads as desired, while contemporaneously according these rights and privileges to the similarly-located and competing Coal Company mines, was not accidental, unforeseen or mere negligence on petitioners' part, but a continuous tort and violation

of statutory duty. In such cases, the courts have held that the mitigation-of-loss rule does not apply. *American Smelting & R. Co. v Riverside Dairy & S. Farm.* 236 Fed. 510, 514-15 (C. C. A. 8); *Wilson v Scarboro,* 88 S. E. 872, 873; *Borden v Carolina Power Co.,* 93 S. E. 442, 443; *Heaney v Heeney,* 2 Denio (N. Y.) 625, 627; *Cardwell v Norfolk, etc. R. Co.,* 88 S. E. 495, 496; *Sutherland on Damages,* (4th Ed.) Vol. 1, p. 479.

For the foregoing reasons and those stated by the Circuit Court of Appeals (997-8), respondent contends that the Commission's action was erroneous as a matter of law.

(c) By multiplying the additional tonnage which the Commission found respondent would have produced if he had accepted the 20-80 offer (28-29) by the profit per ton (29) and totalling the results, a grand total of $34,-310.67 is secured. If this amount with interest is added to the amount of the reparation order with interest, a total of approximately $70,905.00 is secured, or more than sufficient to cover the judgment.

III

1. The assailed Acts and Practices of the Railroads presented questions administrative in character, consequently the Commission's finding that they were in violation of the Act and its prescription of the standard that should have prevailed were necessary prerequisites to maintaining any action for damages.

2. The petition shows that the Commission decided these questions and prescribed the standard. Its action thereon is conclusive.

3. The promulgation of the Commission's finding and standard was delayed beyond the two-year period of limitation, thus making impossible any voluntary election of Section 9 remedies. Respondent was compelled to proceed before the Commission or not at all. A construction of Section 16 (2) that in such cases the injured shipper is limited in maximum recovery to the Commission's award would be unjust, and deprive the shipper of his statutory and property rights.

1. The questions were clearly administrative; i. e., they were of a character not initially cognizable in a court. The basic complaint was not that petitioners violated their rules applicable to one-road mines or their rules applicable to two-road mines. The basic complaint was against their discriminatory classification of respondent's mine as a one-road mine, contemporaneously with their classification of the similarly-located and competing Coal Company mines as two-road mines, for purposes of car distribution. Neither of the railroads could have been mandamused to put respondent's mine in their category of two-road mines, nor could respondent have successfully attacked the railroad's discriminatory classification of the respective mines or the discriminatory car distribution which resulted therefrom as an incident to an initial action for damages in court.

The basic question here was somewhat akin to that presented in *Director General v Viscose*, 254 U. S. 498, 503-4, where a shipper of silk secured an injunction restraining the Director General of Railroads from excluding silk from the category of commodities transported by railroads. He contended in this Court that "there was no administrative question" and that the "thing presents a question of law for the courts" (arguments of counsel, 65 Law Ed. 373-4). But this Court held that "exclusion in this case was an attempted classification * * * within the exclusive initial jurisdiction of the Commission."

In its final analysis, the question here was one concerning car distribution. It was somewhat similar to that presented in *United States v New River Co.*, 265 U. S. 523, 541-2, where joint mines (made so by means of a trackage agreement, 62 I. C. C. 269, 272-3) attacked an order of the Commission limiting such mines to 100 percent of their ratings when ordering cars from both roads serving them. They insisted before the Commission that they had a legal right to order 100 percent of their ratings from each road (62 I. C. C. p. 273); and in this Court, that they had a "legal right to a fair share of the

car supply of each carrier". But this Court held that "the Commission's jurisdiction over the subject is exclusive".

See also *Baltimore & O. R. Co. v United States ex rel Pitcairn Coal Co.*, 215 U. S. 481, 486-7, 493; *Morrisdale Coal Co. v. P. R. Co.*, 230 U. S. 304, 313.

As the questions were administrative, the Commission's finding thereon and its prescription of the standard that should have prevailed were necessary prerequisites to maintaining a suit for damages. *Morrisdale Coal Co. v P. R. Co., supra.*

2. Respondent's petition in the District Court shows that he complied with the foregoing requirement, secured the Commission's finding that the acts and practices of the railroads were unduly prejudicial and the prescription of its standard that respondent should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 percent of the rating of his mine as his judgment dictated and that cars should have been accordingly furnished in conformity with the available supply on the respective roads. Both finding and standard are conclusive on the Courts. *Mitchell Coal & C. Co. v P. R. Co.*, 230 U. S. 247, 258.

But petitioners, first considering the reports attached as exhibits to the petiton as not parts thereof, attack the petition because it does not state "how or why the Commission reached that conclusion" (brief p. 42). It was not necessary. The statement of the causes for which respondent claimed damages set out in the petition clearly disclosed the administrative character of the questions presented to the Commission. With respect to such questions, "This Court has no concern with the correctness of the Commission's reasoning, or with the soundness of its conclusions." *Virginian R. Co. v United States*, 272 U. S. 658, 665-6.

Then considering the reports as parts of the petition, and conceding for the moment that the complaint to the Commission raised an administrative question, petition-

ers contend that the Commission "did not decide the case on that basis" (brief p. 46). Reference is made to the statement in the Commission's report that "it is not necessary * * * to determine whether or not the *Coal Company* was entitled to order its cars in conformity with *existing* car service rules for joint mines and as to that we express no opinion" (15). The report discloses the reason. During a portion of the period, one of the rules permitted a mine served by two railroads to order 75 percent of its rating from each railroad, for 150 percent from both. This rule was condemned by the Commission in a case decided December 11, 1922, and a new rule promulgated which permitted such a mine to order a maximum of only 100 percent of its rating from both roads (14-15). The Commission decided to make this new rule the basis of the standard that should have prevailed at respondent's mine and hence did not consider it necessary to decide whether the Coal Company mines were entitled to order their cars in conformity with the old rule. But the fact that the Commission decides an administrative question one way rather than another, or prescribes one standard rather than another, does not render the question presented any the less administrative. "This Court has no concern with the correctness of the Commission's reasoning".

Petitioners also urge that the Commission did not decide that either the Coal Company or respondent was entitled to a joint mine status (brief p. 50). The service status enjoyed by the Coal Company mines and that prescribed as the standard that should have prevailed at respondent's mine was a joint-mine or two railroad-mine status. In *United States v New River Co.*, 265 U. S. 523, 542, it was said—

> "An operator of a joint mine is not confined to any one carrier serving it. It may order from each carrier; but the total number of cars ordered may not exceed the gross daily rating of the mine. It may select the carrier which, at the time, has the bet-

ter car supply, and receive its pro rata share of that supply according to its gross daily rating, based on its capacity to ship by all carriers. It may choose between the carriers to secure the service, connections, and markets it desires to have."

Petitioners then urge that respondent suffered no *undue* prejudice because the purpose of the trackage agreement was the fuel contract between the Western Maryland and the Coal Company and that respondent had no such contract; and in fact that he suffered no prejudice at all because "an allotment of cars" of equal percentages, as made to the Coal Company was made to respondent (brief pp. 24, 50-1). While the Commission's finding that respondent was subjected to undue prejudice is conclusive on this Court (*Mitchell Coal & C. Co. v P. R. Co., supra*), the contentions are baseless as well as untenable. The purpose of the trackage contract is "not of legal significance" (*Virginian R. Co. v. United States,* 272 U. S. 658, 664), but the fact is, and the Commission's report discloses, that the whole scheme was framed up and put through by and for the benefit of the Coal Company, and that the Coal Company then used it to get the Western Maryland fuel contract (16, 17, 18, 19-20); indeed, when respondent complained to the president of the Western Maryland, he was told to see the president of the Coal Company (17).

In regard to the statement that cars were allotted to the Coal Company on the 20-80 basis, the report shows that while the Commission found that those mines were only permitted to ORDER cars on that basis, it did not find that they were only permitted to RECEIVE cars on that basis. On the contrary, its report states that "there was much testimony that the mines of the Coal Company were operating practically *at capacity* during this period", i. e., practically at 100 percent (18). As the period was one of "severe shortage of cars" (22), it follows that the Coal Company mines actually RECEIVED a much larger supply of cars than they were entitled

to receive on the 20-80 basis, or even on the basis of 100 percent orders to the Western Maryland, as the largest supply which that road had available for *general* distribution during any month of the period was 69 percent (23). And neither report of the Commission contains any finding or statement that respondent was offered CARS on the 20-80 basis or rejected any CARS on that or any other basis. As for the paper 20-80 offer, neither report discloses whence it came or how it was presented, but the first report indicates that it was not concurred in by the Western Maryland, the road whose service respondent was endeavoring to secure (17, 18, 20).

In any event the Coal Company mines, being reached by both roads and having rates in effect therefrom via both roads, had an enforceable legal right to order their cars and ship their coal as they saw fit, and they exercised the right throughout the period (17-18). In *Bell & Zoller Coal Co. v B. & O. S. W. R. Co.*, 74 I. C. C. 433, 439, cited in the Commission's report herein (14), the Commission said—

> "Whenever the joint mine orders cars from the different carriers serving it (rather than from the carrier with the larger supply), it is doubtless due to other compensating advantages which outweigh those of a temporary greater car supply *and such election is the voluntary choice of the shipper.*"

3. The petition shows that although respondent filed his complaint with the Commission in October, 1923, or only a few months after the close of the period involved, the Commission did not finally decide the administrative questions until May 10, 1926 (5, 10). As the statute fixes a limitation of two years within which to institute a proceeding for damages, respondent was not able to make a voluntary election of Section 9 remedies; he was compelled by the Commission's delay to proceed before that body for damages, or not at all. He proceeded before the Commission, secured a reparation order which

petitioners elected to refuse to pay, filed his Section 16 suit thereon, and recovered judgment for an amount which, although greater than the Commission's award, was less than that body's computation of his damages.

A construction of Section 16 that in such cases the injured shipper is limited in maximum amount to the Commission's reparation order, even though the amount of the order was arrived at by the use of an erroneous formula or as the result of incorrect mathematical computations, would be flagrantly unjust and unfair. If such be the law the socalled election of remedies is a sham and delusion for, by the Commission's delays or the carriers' dilatory tactics in prolonging the case before the Commission, the injured shipper can be easily deprived of his supposed rights in that regard.

This Court has held that it is "bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute". *Knowlton v Moore*, 178 U. S. 42, 77. By the plain language of the Act, the more reasonable interpretation of the Circuit Court of Appeals herein is abundantly present in Section 16.

IV

The questions whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's award are res judicata, having been determined by the decree in Brady v Interstate Commerce Commission, 43 Fed.(2) 847, affirmed Brady v United States, 283 U. S. 804.

1. These questions were among those presented for determination in the equity proceeding above cited, which was instituted in the same District Court and at about the same time as was the instant action at law (5, 8). The bill of complaint attacked the deductions made by the Commission from the gross amount of respondent's damages. It was represented that unless they were set aside and annulled respondent would be sub-

jected to irreparable injury for which he had no plain, adequate and complete remedy at law. The court was asked to set aside and annul them, direct the Commission to make a supplemental order consistent with the decree of the court, and to grant such further relief, etc. The respondents moved to dismiss for lack of jurisdiction. (8, 105, 106; also 43 Fed. (2) pp. 848, 849).

The Court (Circuit Judges Parker and Northcott and District Judge Baker) decided the question or questions as follows (43 Fed. (2) p. 852)—

> "If the party in whose favor it (reparation order) is made is not satisfied with it, he may in instituting his suit set forth the cause of action for which he claims damages, and the order of the Commission, and have his case proceeded with "In all respects like other civil suits for damages" except that on the trial the findings and order of the Commission shall be *prima facie* evidence of facts therein contained. There is nothing in the Act, we think, which limits his recovery to the amount awarded by the Commission and there is no reason why the recovery should be so limited. The order and findings of the Commission are *prima facie* evidence, just as is the report of an auditor in an action at law. *Ex parte Peterson*, 253 U. S. 300. * * * It is apparent, therefore, that no irreparable injury is to be apprehended from reparation orders of the Commission, that any errors therein may be corrected in the trial provided for by statute, and that resort to injunction to set aside such orders is not permissible.
>
> "FOR THE REASONS STATED, we think that the Court is without jurisdiction to entertain the suit, and the bill will accordingly be dismissed."

The plaintiff (respondent here) in the law action was the complainant in the equity proceeding. The two defendants (petitioners here) in the law action were respondents in the equity proceeding, *having voluntarily*

intervened, submitted themselves to the jurisdiction of the Court, and participated by counsel in the hearing (43 Fed (2) p. 848).

2. Every element necessary to, and justifying the application of, *res judicata* is present. There is an identity of parties. There is an identity of *questions*, the *questions* common to both proceedings being whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's reparation order. Those *questions* were actual issues in the equity proceeding. They were presented to a court of equity, so the initial *questions* which that court had to determine were those inherent in the proposition whether the first prerequisite to its jurisdiction as a court of equity was disclosed by the bill. They had to be settled *in limine*. As said by this Court in *Singer Sewing Mach. Co. v Benedict*, 229 U. S. 481, 484—

> In the courts of the United States it is a guiding rule of law that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares (citing statute), and the number of decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*.

See also *United States v Bitter Root Development Co.*, 200 U. S. 451, 472.

Any and every court of equity has inherent power to prevent irreparable injury, and hence inherent power to pass upon questions with respect thereto. Those questions were settled by the special court; it dismissed the bill for lack of jurisdiction "for the reasons stated" one of which was that "no irreparable injury is to be apprehended from reparation orders of the Commission, that

any errors therein may be corrected in the trial provided for by statute and that resort to injunction to set aside such orders is not permissible". And petitioners, having participated in the litigation, are bound by the decision, especially as it was subsequently affirmed by this Court.

In *United States v Moser*, 266 U. S. 236, 242, it was said—

> "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a sebsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question,* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged, but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based." (Empasis by the Court).

3. Petitioners say (brief pp. 23, 48) *res judicata* was never pleaded by respondent. The two actions were carried on simultaneously in the same District court, the petition in the law action referred to the pendency of the equity proceeding, and the judgment in the first case finally determined was automatically decisive of the foregoing common questions in the case left remaining.

Furthermore, for aught the present record shows, the special court's decree was presented at the trial. *Campbell v Rankin*, 99 U. S. 261, 262; *Hornbuckle v Stafford*, 111 U. S. 389, 391.

Next they say (brief 23, 49) the stated conclusions of the court in respect of the jurisdictional question now being discussed were *obiter dicta*. They were not *obiter dicta*. The questions involved therein were distinct issues in the case, were within the general powers of the court to determine, and had to be determined; indeed, it

was the court's duty to determine them *sua sponte in limine*. And the court, "noticing the contention of plaintiff (respondent here) that he stood in danger of irreparable injury" (105), actually and conclusively determined them.

This Court gave no reasons for affirming the decree in the equity proceeding, but petitioners attempt (brief pp. 24, 48) to supply them by what they term the "proper interpretation" of the citations in the memorandum opinion. Their first evolved reason, towit, that "the Commission's order *minimizing* the recovery was negative as to the amount *disallowed*" is self-contradictory, and is in fact an admission of the perfectly-obvious truth that the Commission first found the amount of respondent's damages according to its previously-prescribed administrative standard and then by affirmative action in applying a rule outside the act "minimized" the amount to be awarded. Their second evolved reason, towit, "that there could be no review of the facts found by the Commission in respect of the administrative question" is immediately negatived by their subsequent statement that "the memorandum opinion does not show that this Court regarded an administrative question actually to have been present or decided by the Commission". And this Court's "omission" to cite *Meeker v Lehigh Valley R. Co.*, 236 U. S. 412 is explained by the fact that the special court twice referred to it and what it decided in respect to the meaning of the prima facie clause in Section 16 and hence this Court, in affirming the decree of that court, did not consider it necessary to repeat the citation a third time.

When it is remembered that the Section 16 phase of respondent's Section 9 suit praying judgment for $57,735.11 with interest was pending in the District Court at the time this Court affirmed the decree in the equity proceeding, the proper interpretation of this Court's memorandum opinion and the citations appended thereto seems clear. Respondent interpreted them as holding that the decree of the lower court was affirmed on the grounds stated by that court as the reasons for its deci-

sion and on the further grounds (a) that the suit in equity challenging the Commission's reparation order and asking for complete relief was tantamount to an attempt to start a second Section 9 suit and was therefore not permissible, and (b) that the Commission's order, while only prima facie correct insofar as it determined the fact and amount of respondent's damages (as held by the special court), must be regarded as conclusively correct insofar as it determined the administrative questions.

But whether this Court travelled the same route all the way or a different route part of the way is after all immaterial in the light of the important fact that it arrived at the same goal as did the special court. And when this Court reached that goal, it did not criticise the route which the special court had taken; it did not modify the decree of the special court in any particular. This Court affirmed the decree of the special court and thereby, it is respectfully submitted, sanctioned the result and effect of that court's determination of the foregoing questions upon the instant case.

When it is remembered that an entirely erroneous adjudication of a *fact, question* or *right* in one proceeding may not be disputed in a subsequent action between the same parties (*United States v Moser, supra*), there is certainly a world of room for the proposition that the special court's determination of the foregoing questions in the equity proceeding may not be disputed in the instant case.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE T. BELL,
Attorney for Respondent.

SAMUEL T. SPEARS,
Of Counsel.

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Supreme Court of the United States

October Term, 1932.

No. 526.

THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, *Petitioners*,

v.

A. SPATES BRADY, *Respondent*.

BRIEF FOR RESPONDENT.

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Supreme Court of the United States

October Term, 1932.

No. 526.

THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, *Petitioners,*

v.

A. SPATES BRADY, *Respondent.*

BRIEF FOR RESPONDENT.

STATEMENT.

This is an action for damages sustained by respondent as the result of unlawful acts and practices of petitioners in misclassifying his coal mine and failing and refusing to supply cars thereto in which to ship the coal.

1. Prior to the institution of the action, the Interstate Commerce Commission found that the acts and practices complained of had subjected respondent to undue prejudice in the matter of car supply and, upon a later hearing, that he had sustained damages in the sum of $57,735.11, but that he might have reduced his loss to $12,838.31, if he had accepted a certain "offer" relating to the furnishing of cars (*Brady v. Baltimore & O. R. Co.*, 112 I. C. C. 244; 152 I. C. C. 327; R 9, 19, 20, 26-9). Petitioners refused to pay even this amount and respondent instituted suit in the District

Court under Section 16 (2) of the Interstate Commerce Act (49 U S C A, Ch. 1, Sec. 16 (2)), asking judgment for the full amount of his damages, to wit, $57,735.11, with interest from April 1, 1923, and contending that the Commission's action in reducing the amount to $12,838.31 was beyond its powers, erroneous as a matter of law, and void.

2. Petitioners demurred to the petition instituting the suit, first generally on the ground that it was insufficient in law, and later specially on the ground that it was for an amount in excess of the Commission's award and that the District Court had no jurisdiction "to consider, review, revise or reverse" the award (R 31-33). After the demurrers were overruled, there was a jury trial which resulted in a verdict and judgment for respondent in the sum of $63,048.60, with interest from August 7, 1931, the date of the verdict (R 36). Upon appeal to the Circuit Court of Appeals for the Fourth District, the judgment was affirmed (*Baltimore & O. R. Co. v. Brady*, 61 F. (2d) 242; R 82, 99). This Court granted certiorari (R 102).

3. As the record in the Court below contained no bill of exceptions, the trial judge having declined to sign petitioners' bill because presented too late (*Brady v. Baltimore & O. R. Co.*, 56 F. (2d) 231, R 69, 76; mandamus denied *Baltimore & O. R. Co. v. Baker*, 58 F. (2d) 627; certiorari denied, id. No. 121, October Term, 1932), the only question open is whether the judgment in respondent's favor is supported by the petition.

The petition (R 1) shows that from October 14, 1922 to April 1, 1923, a period of car shortage, respondent owned and operated a coal mine on the Coalton branch of the Baltimore & Ohio between and adjacent to mines of the West Virginia Coal & Coke Company, a competitor, on the same and another branch of that railroad; that by agreement between petitioners effective during the period, the

Western Maryland was granted trackage rights over the branches to reach and serve the Coal Company mines; that the Western Maryland published and had in effect schedules of rates on coal from the Coal Company mines to interstate destinations; that petitioners each had in force rules governing the rating of mines and the distribution of cars thereto on their respective lines; that these rules and certain decisions of the Commission required that during periods of car shortage available cars should be distributed pro rata among the mines in accordance with their ratings on their orders if less than their ratings; that these rules and decisions permitted the operator of a mine reached by two railroads to order 100 per cent or less of its rating from either road or to divide the orders between the two in any way his judgment dictated, provided the combined orders did not exceed 100 per cent of the mine rating, and the mine was entitled to its pro rata share of the available cars on the basis of such orders and to ship the coal loaded therein via the railroad which furnished the cars (R 2-3).

That as a result of the trackage agreement and rate schedules referred to, the Coal Company mines acquired the status of mines located on and reached by two railroads with the right, which it exercised, to order and receive cars from, and to ship via, either or both railroads on the basis of such divisions of 100 per cent of the mine ratings as its judgment dictated; that the said trackage agreement and Western Maryland rate schedules did not name respondent's mine, and he was denied the right to order and receive cars from, and to ship coal via, either or both railroads as his judgment dictated; that he repeatedly requested petitioners to accord his mine the status of one located on both railroads with the right to order and receive cars from, and to ship coal via, either or both railroads as his judgment dictated, but his requests were denied; that he filed written orders for cars with the Western Maryland

but that railroad, although it honored the Coal Company's orders and placed cars for loading at its mines, refused to honor his orders and with a single exception refused to place cars at his mine, whereupon he ordered cars, and received a reduced supply, from the Baltimore & Ohio; that these discriminatory acts and practices of petitioners were unjust, unduly prejudicial and unlawful in violation of the Interstate Commerce Act; that if he had been permitted to secure his allotment of cars from and to ship his coal via either or both railroads as his judgment dictated from day to day, he would have chosen the Western Maryland and secured his entire supply of cars from, and shipped his entire output via, that railroad because it developed from day to day that the Western Maryland had a better supply than the Baltimore & Ohio; that his orders to the Western Maryland entitled him to receive 818.1 cars of an average marked capacity of 50 tons each; that he actually received only 372.8 such cars; that the railroads urged him to load all cars as heavily as possible; that he loaded the cars he received to an average of 53.55 tons per 50-ton car and would have loaded the additional cars to the same average loading; that the state of the market was such that he could have sold the additional output at the same average prices as the coal actually produced; and that as a result of petitioners' unlawful acts and practices, his lost profits on the additional coal he would have produced and sold and his increased costs of mining and selling the coal actually produced and sold aggregated $57,735.11, for which amount with interest from April 1, 1923, he was entitled to judgment against petitioners (R 3-5).

The petition further shows that respondent filed a complaint with the Commission charging among other things that petitioners' acts and practices in failing and refusing to serve his mine with cars as herein described were in violation of the Interstate Commerce Act, and praying an

award of reparation for the damages which he sustained as a result thereof; that after hearing the Commission found that respondent—

> "should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads",

and that petitioners' acts and practices had resulted in undue prejudice to respondent in the matter of car supply; that the Commission then set the case for further hearing with respect to the amount of damages and found upon such hearing that respondent's excess mining costs and lost profits amounted to $57,735.11 as claimed, and that petitioners did not question the method or figures used in the computation thereof, but held that in computing damages this amount should be reduced by the amount which the loss would have been mitigated if respondent had accepted what was referred to as the "80-20 offer", and also by the amount attributable to the overloading of his cars to an average of 53.55 tons per 50-ton car; that the Commission made revised computations based upon these mitigation-of-loss and average loading findings and arrived at $12,838.31, for which amount with interest (or a total of $17,524.29 to May 1, 1929) a reparation order was entered; that a copy of the order was duly served upon petitioners but they refused to observe the order or make the payment therein required; that the mitigation-of-loss and average loading findings and deductions were beyond the power of the Commission, erroneous as a matter of law, and void; and that respondent was entitled to judgment not only for the amount of the reparation order with interest but also for such additional amount as would make an aggregate

sum equal to the full amount of his damages, to wit, $57,735.11 with interest from April 1, 1923 (R 5-9).

The two reports and reparation order of the Commission were attached as exhibits to the petition. The first report dealt with the administrative questions involved and shows that respondent actively competed with the Coal Company in the sale of coal; that his mine was entirely dependent upon the Baltimore & Ohio for car supply and that prior to October 14, 1922, the same thing was true of the Coal Company mines on the Coalton branch (R 11); that on October 5, 1922, a trackage agreement was entered into whereby the Western Maryland was given the right, effective until April 1, 1923, to move 90 loaded cars per day from the Baltimore & Ohio branches (R 12); that this was "about" the capacity of the Coal Company mines and "what they had been used to shipping" (R 15); that under the rules then in effect a mine served by two roads, to wit, a "joint" mine, had the right to order 100 per cent of its rating from either road or 75 per cent from each road, but in December, 1922, this was changed so that it could order 100 per cent of its rating from either road or divide its orders between the two as desired provided the combined orders did not exceed 100 per cent of its rating (R 13); that petitioners "contended" that they had an "understanding" with the Coal Company whereby its mines ordered 80 and 20 per cent of their ratings from the Western Maryland and B. & O. respectively, and that a similar "arrangement" was offered to respondent but he declined (R 13-14); that the 80-20 arrangement was adapted to the needs of the Coal Company, based upon its past shipments, and the result of conference and agreement with its president (R 16); that although petitioners "contended" that the object of the agreement was to give the Western Maryland a dependable source of fuel supply, the Coal Company also shipped commercial coal under the agreement (R 16-17);

that the Coal Company mines operated "practically at capacity" during this period and were able to maintain a good supply of labor to the detriment of respondent due to inadequate car supply to his mine (R 17); that a mine served by two roads enjoys advantages not possessed by a mine served by only one and that the reasonable enjoyment of these advantages should be protected (R 18); that carriers may not, by withholding their equipment or facilities, dictate or control the markets which a particular shipper shall seek or enjoy, while adapting their services to the needs of a competing shipper (R 18); that by fixing the proportions of car supply which the Coal Company would be furnished by the respective carriers in conformity with its customary shipments and after conference with its president, the advantages referred to were made available to the Coal Company (R 18); that like consideration was not given to respondent, but he was offered arbitrarily and without regard to the requirements of his business that which had been "arranged" for his competitor after deliberation (R 18); that such service would not have been similar or on a basis of equality between shippers and respondent was thereby subjected to undue and unreasonable disadvantage (R 18); that respondent should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply on the respective roads (R 19); and finally that upon all the facts of record the acts and practices of petitioners, whereby they accorded Western Maryland service to the Coal Company mines "while failing to accord similar service" to respondent's mine located intermediate thereto, resulted in undue prejudice to him in the matter of car supply (R 19).

The second report dealt with the amount of damages (R 21) and shows that respondent ordered a 100 per cent supply of cars from the Western Maryland, but since that carrier would not honor his requisitions on that basis, he also placed his orders with the B. & O. (R 21); that he was entitled to receive 818.1 cars from the Western Maryland during the period, but actually received only 5 cars from that road and 367.8 cars from the B. & O. (R 22); that he accepted the cars furnished and loaded them with an average of 53.55 tons per 50-ton car (R 22); that the figures upon which he claimed a loss of $57,735.11 were not questioned (R 26); and that the amount claimed as damages should be reduced only because of the mitigation-of-loss and average loading findings previously referred to, as to which the report states (R 27)—

> "It is a familiar rule that a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss. (Citing cases). That principle is applicable here. By reasonable action on his part in accepting defendants' 20-80 offer, complainant could have increased his production to the extent of 1,825 tons in October, 1,940 tons in November, 3,960 tons in December, 4,950 tons in January, 2,545 tons in February, and 1,485 tons in March. To this extent his damage was due to his own action and defendants cannot reasonably be expected to compensate him therefor. Complainant also erred in computing the tonnage that he could have produced, if he had been allowed to avail himself of the Western Maryland's car supply, by using an average loading of 53.55 tons per car. Under the rules 50 tons is used in determining the daily car rating and is likewise used in the rules governing distribution to coal mines."

4. About the time the petition in this action was filed in the District Court, respondent filed a bill in equity in the same court against the Commission and the United States,

attacking the mitigation-of-loss and average loading findings and deductions as beyond the power of the Commission, erroneous as a matter of law, and void (R 1, 8-9). It was represented that unless they were set aside and annulled, he would be subjected to irreparable injury for which he had no plain, adequate and complete remedy at law. The court was asked to set aside and annul them, direct the Commission to make a supplemental order consistent with the decree of the court, and to grant such other and further relief, etc. Petitioners intervened, became parties respondent, and participated in the hearing. Upon respondents' motions, the court (consisting of District Judge Baker and Circuit Judges Parker and Northcott) dismissed the bill for lack of jurisdiction "for the reasons stated", one of which was that "no irreparable injury is to be apprehended from reparation orders of the Commission, that any errors therein may be corrected in the trial provided for by statute, and that resort to injunction to set aside such orders is not permissible" (R 8, 97-8; *Brady v. Interstate Commerce Com.*, 43 F. (2d) 847, 848, 849). The decree of dismissal was affirmed by this court. (*Brady v. United States,* 283 U. S. 804).

QUESTIONS PRESENTED.

The question whether the judgment in respondent's favor is supported by the petition divides itself into minor questions as follows:

1. Whether the petition alleges a cause of action upon which suit may be maintained.
2. Whether the petition shows that respondent sustained damages to the amount adjudged in his favor.
3. Whether, in any event, respondent is limited in his recovery to the amount of the Commission's award. In this connection, there is the additional question—

4. **Whether respondent's right of action for, and the District Court's jurisdiction to grant recovery of, a greater amount than the Commission's award are *res judicata*, in view of the decree in the equity proceeding.**

SUMMARY OF THE ARGUMENT.

I.

The petition alleges a cause of action upon which suit may be maintained. The assailed acts and practices of the railroads represented questions administrative in character, requiring the Commission's finding that they were in violation of the Act and its prescription of the standard that should have prevailed as prerequisites to the maintenance of a suit thereon. The petition shows that the Commission decided the questions and prescribed the standard. Its action thereon is conclusive.

1. Petitioners' position in this Court on the question whether respondent's cause of action presented questions administrative in character is the direct reverse of that presented to the Court below.

2. The basic question before the Commission was one of mine classification for purposes of car distribution, and was within the exclusive jurisdiction of the Commission. Respondent was therefore compelled to resort to that tribunal in the first instance.

3. The Commission's finding of undue prejudice and its prescription that petitioners should have accorded respondent's mine the rights and privileges of a two-road or "joint" mine are conclusive on the courts. With respect to such matters, "this court has no concern with the correctness of the Commission's reasoning".

4. The purpose of the trackage contract is not of legal significance, nor is the fact that respondent desired 100

per cent Western Maryland cars while the Coal Company desired 80 per cent Western Maryland and 20 per cent Baltimore & Ohio cars. Regardless of hypothetical illustrations to the contrary, respondent's mine would have operated at a lesser percentage of capacity on 100 per cent Western Maryland cars than the Coal Company mines *actually* operated on the cars they received.

II.

The petition shows that respondent sustained damages in at least the amount adjudged in his favor. The petition complied with the statute by setting forth the causes for which respondent claimed damages and the Commission's order (including the reports made parts thereof) in the premises, and nothing contained therein required any deduction from the amount sued for, whether the petition proper is considered alone or the Commission's reports are considered incorporated therein. In any event, the mitigation-of-loss and average loading findings quoted and referred to in the petition were beyond the powers which the Commission could properly exercise in this case, erroneous as a matter of law, and void.

1. Petitioners, having failed before the trial to raise any question in respect of alleged inconsistencies and contradictions in the petition, are estopped from doing so after judgment.

2. The petition did not adopt the Commission's findings quoted therein or its reports attached thereto, or incorporate them for the purpose of cutting down the amount sued for.

3. The petition put the railroads upon notice that respondent intended to attack the prima facie correctness of the Commission's findings as to the amount of his damages

and to present additional evidence in support of his claim at the trial.

4. The verdict and judgment were for an amount considerably less than the amount sued for. There being no bill of exceptions in the record, it must be assumed that "the case was fairly and fully submitted in the charge of the judge to the jury" and that there was "testimony tending to show damages" to the amount of the verdict and judgment.

5. In any event, the mitigation-of-loss finding and deduction were beyond the powers which the Commission could properly exercise in this case, or erroneous as a matter of law and void, because (a) they were inconsistent with the Commission's previously-prescribed administrative standard; (b) they were, as the Commission's report discloses, unsupported by the only kind of evidence that could legally support them; (c) respondent's action in respect of the 80-20 offer was entirely reasonable; (d) there was nothing to prevent petitioners from placing *cars* at respondent's mine on the 80-20 basis and thus have averted his losses to that extent; (e) respondent did all the mitigation-of-loss rule required by ordering cars from both carriers and accepting and loading all cars actually tendered to him; and (f) petitioners' failure to accord respondent his rights in the premises was a continuous tort and violation of statutory duty, hence the mitigation-of-loss rule was inapplicable. The average loading deduction was likewise void because the Commission's report discloses that the finding in respect thereof does not, as a matter of law, support the deduction.

III.

Respondent's right of action and the District Court's jurisdiction were not limited in maximum amount to the Commission's award. This is a Section 16 (2) suit for damages resulting from violations of the Interstate Commerce Act, filed pursuant to a reparation order of the Commission not complied with by the carriers. The fundamental principles of equality and uniformity underlying the whole statute, as well as the plain language of section 16 (2) itself, compel the conclusion that in such suit the plaintiff has the right to recover, and the District Court the jurisdiction to give judgment for, the full amount of damages sustained, even though such amount is greater than the Commission's award.

1. The Act provides two alternative methods or means for the recovery of damages, in both of which, so this Court has held pursuant to the fundamental principles of equality and uniformity which underlie the whole statute, the same period of limitation applies, the cause of action accrues at the same time, the same starting basis (a finding by the Commission on the administrative question) is required, and the same rules of law prevail. The same fundamental principles require that both methods shall be subject also to the same judicial machinery for correcting errors and mistakes.

2. The section 16 (2) suit is an adjunct of the method of procedure before the Commission with the same corrective function, scope and power as the new trial in the alternative method of procedure in the District Court. As in a new trial in the District Court the amount of the reversed judgment is not the maximum measure of permissible recovery, so in a Section 16 (2) suit the amount of the Commission's award is not.

3. Section 16 (2) specifically provides that "such suit *shall* proceed in *all* respects *like other civil suits for damages*" with two, and only two, exceptions, neither of which limits recovery to the Commission's award; and the Courts are not at liberty to ingraft other exceptions. The shipper's rights under "such suit" were materially enlarged by the Hepburn Act.

4. This Court has sustained a greater recovery than the Commission's award (correctly computed) in one case, has clearly intimated in other cases that a District Court has jurisdiction so to do in a Section 16 (2) suit, and has specifically held that "such suit is not on the award as such."

5. To construe Section 16 (2) as permitting recovery of the full amount of the plaintiff's loss even though greater than the Commission's award is necessary to avert injustice in cases where, as here, the Commission's delay in determining the administrative question deprives the plaintiff of his right to make a voluntary election of Section 9 remedies.

6. The decisions cited by petitioners in support of the alleged "implication" therein that a reparation order less in amount than the sum claimed is, as to the diminution, an unreviewable negative order were all in cases presenting administrative questions, and in which the Commission dismissed the complaints. The proceedings never arrived at the stage where reparation was even considered. The negative orders entered were not reparation orders in any sense of the term; they were negative pronouncements addressed to the administrative questions. In the instant case, respondent did not attack the Commission's administrative finding and standard; on the contrary, he asked the District Court to "enforce" them fully.

IV.

The questions whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's award are res judicata, having been determined by the decree in Brady v. Interstate Commerce Com., 43 Fed. (2) 847, affirmed Brady v. United States, 283 U. S. 804.

1. The foregoing questions and rights were contested issues in the equity proceeding and, as petitioners were parties respondent therein and participated in the hearing, they are bound by the special court's decision that it was without jurisdiction "for the reasons stated", one of which was that no irreparable injury is to be apprehended from reparation orders and that errors therein may be corrected in the Section 16 (2) suit. The decision on these questions and rights was not *obiter*.

2. The fact that *res judicata* was not pleaded by respondent is not fatal to its application here. Respondent was the plaintiff in the law action, his petition therein referred to the pendency of the equity proceeding, and both cases were being carried on simultaneously in the same District Court.

3. Even though the special court's determination of the foregoing questions was erroneous, nevertheless it is the law of this case and may not be disputed.

4. This Court affirmed the decree of the special court in the equity proceeding and thereby sanctioned the validity of the decision as *res judicata* of all questions and rights raised therein between the parties thereto, even though the affirmance may have been based on grounds other than those named by the special court.

ARGUMENT.

I.

The petition alleges a cause of action upon which suit may be maintained. The assailed acts and practices of the railroads presented questions administrative in character, requiring the Commission's finding that they were in violation of the Act and its prescription of the standard that should have prevailed as prerequisites to the maintenance of a suit thereon. The petition shows that the Commission decided the questions and prescribed the standard. Its action thereon is conclusive.

1. Petitioners have reversed their position on this subject. In the court below, they presented three contentions in respect thereof. Their first contention, that no cause of action is alleged because respondent was not entitled to Western Maryland service, was tantamount to an admission that he had no right to such service capable of being enforced initially in a court and hence that the question whether his mine was entitled to a two-road status was administrative. Their second contention, that if so entitled he was not prejudiced because the Coal Company was restricted to the 80-20 arrangement, was tantamount to insisting that if respondent's mine was entitled to a two-road status, the Commission had erroneously decided the additional administrative question presented by the so-called 80-20 offer. They further contended that the Commission had erroneously decided the basic question of undue prejudice in view of the fact that the advantages accorded the Coal Company mines were brought about by means of a mere trackage agreement. But now that the court below has demonstrated the significance of the fact that the questions were administrative, petitioners take the position in this Court that they first started to take in their reply

brief in the court below, to wit, that the questions were not administrative.*

2. The questions involved were clearly administrative. They were of a character not initially cognizable in a court. The basic complaint was against petitioners' discriminatory classification of respondent's mine as a one-road mine, contemporaneously with their classification of the similarly-located and competing Coal Company mines as two-road mines, for purposes of car distribution. Neither of the carriers could have been mandamused to put his mine in their category of two-road mines, nor could their classification of his mine as a one-road instead of a two-road mine been enjoined, independently of an order of the Commission. Nor could respondent have successfully attacked the discriminatory classification of the respective mines, or the discriminatory car distribution which resulted therefrom, as an incident to an action for damages in court. *Baltimore & O. R. Co. v. United States ex rel Pitcairn Coal Co.*, 215 U. S. 481, 486-7; *Mitchell Coal & C. Co. v. P. R. R. Co.*, 230 U. S. 247, 257-8.

The basic question here was somewhat akin to that presented in *Director General v. Viscose*, 254 U. S. 498, 503-4, where a shipper of silk secured an injunction restraining the Director General of Railroads from excluding silk from the category of commodities transported by railroads. He contended in this Court that "there was no administrative question" and that the "thing presents a question of law for the courts" (arguments of counsel, 65 Law Ed. 373-4). But this Court held that "exclusion in this case was an attempted classification *** within the exclusive initial jurisdiction of the Commission."

In their final analysis, the questions concerned car distribution. They were somewhat similar to that presented in *United States v. New River Co.*, 265 U. S. 533,

*Moreover, petitioners treated the questions as administrative all through the litigation before the Commission; they made no request for a reconsideration of the Commission's findings in the first report, and made no attack upon them in the hearing on damages (R 26), or on their demurrers (R 32-3).

541-2, where joint mines (made so by means of a trackage agreement, 62 I. C. C. 269, 272-3) attacked an order of the Commission limiting such mines to 100 per cent of their ratings when ordering cars from both carriers serving them. They insisted before the Commission that they had a legal right to order 100 per cent of their ratings from each carrier (62 I. C. C. p. 273); and in this Court, that they had a "legal right to a fair share of the car supply of each carrier". But this Court held that "the Commission's jurisdiction is exclusive".

As the questions were administrative, the Commission's finding thereon and its prescription of the standard that should have prevailed were necessary prerequisites to maintaining a suit for damages. *Morrisdale Coal Co. v. P. R. R. Co.*, 230 U. S. 304, 313. The petition shows that respondent complied with this requirement. He secured the Commission's finding that petitioners' acts and practices, whereby they accorded Western Maryland *service* to the Coal Company mines while failing to accord similar *service* to his mine, had subjected him to undue prejudice in the matter of car supply. He also secured the Commission's prescription of the standard that he "should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 per cent of the rating of his mine as his judgment dictated and cars should have been accordingly furnished in conformity with the supply of cars available on the respective roads".

The petition further shows that the foregoing finding and standard were prescribed by the Commission upon a consideration of "all the facts of record", including the so-called 80-20 offer (the form, date, source and duration of which are not disclosed) and the fact that respondent accepted all real offers of transportation, to wit, CARS, actually tendered to him by the carriers. Both finding and standard were the prescriptions of a body "informed by experience" in such matters, and are conclusive except on

grounds which have no basis in this record. *Mitchell Coal & C. Co. v. P. R. R. Co.*, 230 U. S. 247, 258; *Morrisdale Coal Co. v. P. R. R. Co.*, 230 U. S. 304, 313. With respect to such administrative matters, "this court has no concern with the correctness of the Commission's reasoning, or with the soundness of its conclusions." *Virginian R. Co. v. United States*, 272 U. S. 658, 665-6.

3. Conceding for the moment that the complaint to the Commission raised an administrative question, petitioners also contend that the Commission "did not decide the question on that basis". Reference is made to the statement in the Commission's report that "it is not necessary * * to determine whether or not the *Coal Company** was entitled to order its cars in conformity with *existing* car service rules for joint mines and as to that we express no opinion" (R 14). The report discloses the reason. Originally, one of the rules permitted a mine served by two carriers to order 75 per cent of its rating from each if it ordered cars from both. This rule was condemned by the Commission December 11, 1922, and a new rule established which permitted such a mine to order a maximum of only 100 per cent of its rating from both carriers (R 13). The Commission decided to make this new rule the basis of the standard that should have prevailed at respondent's mine and hence did not consider it necessary to decide whether the Coal Company was entitled to order its cars in conformity with the old rule. The fact that the Commission decides an administrative question one way rather than another does not make the question any the less administrative.

Petitioners urge that the Commission did not decide that either the Coal Company or respondent was entitled to a joint mine status. The contention is baseless. The service status enjoyed by the Coal Company mines and that pre-

*Unless otherwise stated, all italics (emphasis) in this brief have been supplied.

scribed as the standard that should have prevailed at respondent's mine was a joint mine or two-road status. In *United States v. New River Co.*, 265 U. S. 533, 542, it was said—

> "An operator of a joint mine is not confined to any one carrier serving it. It may order from each carrier; but the total number of cars ordered may not exceed the gross daily rating of the mine. It may select the carrier which, at the time, has the better car supply, and receive its pro rata share of that supply according to its gross daily rating, based on its capacity to ship by all carriers. It may choose between the carriers to secure the service, connections, and markets it desires to have."

Lastly on this subject, petitioners contend that respondent suffered no *undue* prejudice because the purpose of the trackage agreement was the Coal Company's fuel contract with the Western Maryland and he had no such contract; and in fact that he suffered no prejudice at all because an "allotment of cars" of equal percentages as made to the Coal Company was made to him. While the Commission's finding that respondent was subjected to undue prejudice is conclusive, the contentions are baseless as well as untenable. The purpose of the trackage contract is not of legal significance (*Virginian R. Co. v. United States*, 272 U. S. 658, 664), but the fact is, and the Commission's report clearly discloses, that the whole scheme was framed up by and for the benefit of the Coal Company, and that the Coal Company then used it to get the Western Maryland fuel contract (R 14-18); indeed, when respondent complained to the president of the Western Maryland, he was told to see the president of the Coal Company (R 16).

In regard to the statement that cars were furnished to the Coal Company mines on the 80-20 basis, the report shows that while cars were furnished in those *proportions*,

they were furnished in sufficient *quantities* that "the mines of the Coal Company were operated practically *at capacity* during this period", i. e., practically at 100 per cent (R 17). In marked contrast to this unduly preferential car supply to the Coal Company mines during a period of acute car shortage, the supply furnished to respondent's mine was sufficient to operate it at only 22.9 to 34.96 per cent of capacity; and even if it had been permitted to secure its entire allotment from the Western Maryland, the supply would have been sufficient to operate it at only 44.5 to 61.91 per cent (R 22). As against what actually transpired, "simple illustrations" like those presented on page 11 of petitioners' supplemental brief are worthless.

Moreover, neither report of the Commission contains any concrete finding or statement that respondent was tendered CARS in 80-20 proportions, or that he rejected CARS in those or any other proportions. On the contrary, the second report shows that he accepted and loaded all cars furnished to his mine. The so-called 80-20 offer (the form, date, source and duration of which are not disclosed by either report) must have been a mere letter or verbal offer, not once backed up with actual tenders of CARS in those proportions or the publication of Western Maryland rates. The ultimate finding of the Commission was that respondent had been subjected to undue prejudice in the matter of CAR SUPPLY, and that CARS should have been furnished to his mine by the respective carriers based on orders divided in such proportions as his judgment dictated. The fact that the Coal Company desired and received CARS divided 80 per cent Western Maryland and 20 per cent B. & O., while respondent desired 100 per cent Western Maryland, is immaterial. "Such election is the voluntary choice of the shipper". *Bell & Zoller Coal Co. v. B. & O. S. W. R. Co.*, 74 I. C. C. 433, 439.

The Commission's findings on the administrative ques-

tion were in no sense arbitrary or unreasonable. If petitioners' contentions are intended as representations to the contrary, they are without merit.

II.

The petition shows that respondent sustained damages in at least the amount adjudged in his favor. The petition complied with the statute by setting forth the causes for which he claimed damages and the Commission's order (including the reports made parts thereof) in the premises, and nothing contained therein required any deductions from the amount sued for, whether the petition proper is considered alone or the Commission's reports attached as exhibits are considered as incorporated therein. In any event, the mitigation-of-loss and average loading findings and deductions quoted and referred to in the petition were beyond the powers which the Commission could properly exercise in the case, erroneous as a matter of law, and void.

The statement of causes for which respondent claimed damages set out in paragraphs 3-9 of the petition shows that he sustained losses in the sum of $57,735.11 as the result of petitioners' unlawful acts and practices. The petition prayed judgment against them for this amount with interest from April 1, 1923, or a total of about $85,602.00 to the date of the judgment order. The judgment was for $63,048.60 with interest from August 7, 1931, or a total of about $63,363.00 to the date of the judgment order.

But petitioners contend that a subsequent paragraph or subdivision of the petition (No. 10; R 5) and the Commission's report in effect contain the inconsistent and contradictory allegation that respondent's damages over and above the Commission's award were "due to his own action", and hence that the petition does not support the judgment. The Commission's award was for $17,524.29 as

of May 1, 1929, which, with interest to the date of the judgment order, makes a total of about $19,978.00.

1. The sufficiency of the petition to support the judgment is not open to attack by petitioners on the foregoing ground. This case was tried in the Northern District of West Virginia. The West Virginia Code, 1931 (Chap. 56, Art. 4, Sec. 36), effective January 1, 1931, provides that—

> "All demurrers in civil cases shall be in writing and shall state *specifically* the grounds of demurrer relied on, and no grounds shall be considered other than those so stated, except by the court of its own accord, but the demurrant may, by leave of court, amend his demurrer by stating additional grounds, or otherwise, *at any time before the trial at law* or final hearing in equity".

Furthermore, it had been held as long ago as 1899 by the supreme court of that state that "a pleading when presented is presumed to be sufficient and it is the duty of a demurrant if he thinks it insufficient and desires to take advantage of it, at least to call the court's attention to the defects or imperfections in such pleading." *Koontz v. Koontz*, 47 W. Va. 31, 34.

The demurrers in this case, although filed with the clerk of the court in March, 1930, were not presented to and passed upon by the trial judge until July 14, 1931, or over six months after the above code provision became effective (R 34). The only grounds stated "*specifically*" in them were that the demand or claim asserted in the petition was for an amount largely in excess of the Commission's award and that respondent has no right of action to cause the court, and the court no jurisdiction, "to consider, review, revise or reverse" the Commission's award. These grounds challenged the jurisdiction of the court, not the sufficiency of the petition. As petitioners did not raise before the trial any objection to the petition based upon alleged in-

consistencies and contradictions therein, they are estopped from doing so after judgment. Their failure to raise such an objection *specifically* in their demurrers was tantamount to a waiver of the point. Any and all inconsistencies, defects and imperfections in the petition were cured by the verdict. *Township of Lincoln v. Iron Co.,* 103 U. S. 412, 415; *Palmer v. Arthur,* 131 U. S. 60, 64; *Long v. Campbell,* 37 W. Va. 665, 671.

A carrier may waive such objections in a section 16 (2) suit. *Mitchell v. Lehigh Valley R. Co.,* 236 U. S. 412, 426-7; *Pennsylvania R. Co. v. Minds,* 250 U. S. 368, 374-5.

2. In any event, the petition complied with the statute, sued for a greater amount than the judgment, and nothing contained in the pleading required any deduction from the amount sued for. In setting forth the causes for which respondent claimed damages and the order of the Commission in the premises, including the reports made parts thereof, the petition complied with Section 16 (2) of the Act. *Vicksburg, Shreveport & P. R. Co. v. Anderson-Tully Co.,* 256 U. S. 408, 415. In quoting the mitigation-of-loss and average loading findings and deductions and challenging their correctness, it put petitioners upon notice that respondent intended to attack the prima facie validity of the quoted findings and to present additional proof in support of his claim at the trial. The petition did not adopt the quoted findings or attached reports in any respect or for any purpose inconsistent with the primary allegations in paragraphs 3-9 and the *ad damnum* in paragraph 12. It certainly did not incorporate them for the purpose of cutting down the amount sued for. The annexation of an exhibit to a pleading does not amount to an allegation that the statements and recitals contained therein are true and correct. *Sweeney v. Johnson,* 130 Pac. 997, 998.

First considering the petition alone and without regard to the reports attached as exhibits, *and giving heed to the*

rule that a pleading must be construed in its entirety, it is clear that the direct and unqualified allegations in paragraphs 6 and 7 that petitioners failed and refused to make the trackage agreement apply to respondent's mine, to publish Western Maryland rates therefrom, to accord a two-railroad status thereto, and to honor his requisitions for Western Maryland cars, and the allegation in paragraph 9 that he accepted and loaded all cars received, are tantamount to a denial that petitioners tendered, or he received, any "offer" of cars which was subsequently rejected. A coal mine's orders for cars in accordance with its rating are the legal equivalents of tenders of freight for transportation. *Rules Governing Rating of Coal Mines,* 95 I. C. C. 309, 311. Therefore, the allegation that respondent filed written orders for cars with the Western Maryland which with a single exception that road refused to honor on any basis constitutes an averment that it made no "offer" to transport his freight by placing cars for loading at his mine. The Interstate Commerce Act provides that no carrier may engage in the transportation of property or the furnishing of cars therefor unless and until rate schedules have been duly published and filed, and thereby recognizes no other way by which a carrier may "offer" its services. *Sections* 6 (7) and 1 (3). Therefore, the allegation that the Western Maryland refused to publish rates from respondent's mine constitutes an averment that that carrier refused to put itself in a position to make or join in a legal "offer" of transportation and cars, 80-20 or otherwise, to respondent.

The quoted findings in paragraph 10 of the petition that "by reasonable action on his part" in accepting the unexplained "80-20 offer", respondent could have increased his production and that "to this extent his damage was due to his own action and defendants can not reasonably be expected to compensate him therefor" were mere conclusions

of the Commission with which respondent flatly disagreed as shown by paragraphs 3-9 of the petition.

So, too, the direct and unqualified allegation in paragraph 9 of the petition that petitioners urged respondent to load his cars "as heavily as possible", that pursuant thereto he loaded them to an average of 53.55 tons per 50-ton car, and that he was entitled to judgment for an amount which took into consideration such loading is tantamount to a denial that the "rules" used in determining the *ratings* of mines expressed in cars and the *distribution* of cars contained any restriction against so *loading* the cars in times of car shortage.

Furthermore, paragraph 11 of the petition contains the unqualified allegation that the mitigation-of-loss and average loading findings quoted in paragraph 10, and the deductions made pursuant thereto, were beyond the power of the Commission, erroneous as a matter of law, and void. In *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 91, 92, this Court held that a finding "contrary to the indisputable character of the evidence" is void, and that "a finding without evidence is beyond the power of the Commission". Therefore, the unqualified allegation in paragraph 11 that the findings quoted in paragraph 10 were beyond the power of the Commission and void is tantamount to an averment that the findings thus assailed were contrary to the indisputable character of the evidence presented to the Commission, and indeed without evidence to support them, and were contrary to the actual facts.

3. Now taking the Commission's reports as incorporated in the petition, exhibit A states that "defendants *contend* that complainant (respondent) was offered the same arrangement but he declined and cannot be heard to complain", and further that "whether or not this is true and whether or not similar service was in fact offered complainant depends upon surrounding circumstances". Among oth-

er "surrounding circumstances" appearing on the face of the report are that the maximum of 90 cars per day which the Western Maryland could move from the Baltimore & Ohio branches under the agreement represented the capacity of the Coal Company mines alone and what those mines alone "had been used to shipping"; that *in the latter part of October, 1922* respondent applied to the president of the Western Maryland for service via that road and his application was denied; and that the ultimate finding and conclusion of the Commission upon all of the facts of record was that petitioners' acts and practices whereby they accorded Western Maryland service to the Coal Company mines, "*while failing to accord similar service to complainant's mine* located intermediate thereto resulted in undue prejudice to complainant".

Exhibit B to the petition shows that respondent accepted and loaded all cars furnished by both carriers, and hence shows that he accepted each and every real offer of transportation made by either or both carriers. It also states that at the hearing on damages a witness for respondent denied that his mine was offered the 80-20 basis, and while it further states that the contrary is shown by testimony of the same witness at the first hearing, questions with regard thereto were thus raised to be passed upon oy the jury in the light of all the evidence, including the reports of the Commission.

Further, in this connection, exhibit B states that "practically all" the evidence introduced by the carriers was in support of the rejected contention that respondent's mine was excessively rated. It also states that the carriers did not question the method or figures used by respondent in his computation of damages, in which was included the computation of lost tonnage at 53.55 tons per 50-ton car. It enumerates petitioners' contentions, none of which was that the rules for rating mines and distributing cars con-

tained a restriction against loading cars as heavily as possible (R 26). These circumstances support the allegation in paragraph 12 that the assailed findings and deductions were void because made without evidence to support them or contrary to the indisputable character of the evidence.

When all these facts and details appearing on the face of the reports are considered in connection with the unqualified allegations in paragraphs 3-9 and 11 and the *ad damnum* in paragraph 12 of the petition proper, it is submitted that the court below was justified in holding that there was nothing in the petition itself which required a deduction from the gross amount of respondent's claim. This holding of the court was made with specific reference to the mitigation-of-loss deduction, but the foregoing analysis of the petition and reports shows that it was equally applicable to the average loading deduction.

Even in those jurisdictions where the common law rule of construing pleadings against the pleader has not been changed, a liberal construction in favor of the pleading is adopted after verdict. *Corpus Juris,* Vol. 49, pp. 115-16. This Court has held that pleadings should receive a reasonable interpretation (*Lockhart v. Leeds,* 195 U. S. 427, 434; *Swift & Co. v. United States,* 196 U. S. 375, 390), and this Court as well as the lower Federal Courts have indicated that petitions in Section 16 (2) suits pursuant to reparation orders should be liberally construed. *Vicksburg, S. & P. Ry. Co. v. Anderson-Tully Co.,* 261 Fed. 741, 745, affirmed 256 U. S. 408, 415; *Southern P. Co. v. Goldfield Consol. Milling & T. Co.,* 220 Fed. 14, 19.

4. In further support of the sufficiency of the petition, and assuming the reports attached thereto as incorporated therein and the 80-20 offer as having been concurred in by both roads and received by respondent, it is contended that in view of the facts found in or derivable from the reports, the mitigation-of-loss and average loading de-

ductions were beyond the power which the Commission could properly exercise in this case, erroneous as a matter of law, and void.

(a) Once the Commission finally finds acts and practices of carriers in violation of the statute and fixes the lawful standard, that standard is conclusive whether it relates to the past, present or future. It is the same as though the standard had been in the statute during the period covered by the case; having been fixed pursuant thereto, it is to all intents and purposes a part of it and hence binding upon all parties concerned, including the Commission when subsequently acting in its quasi-judicial capacity. *Mitchell Coal & C. Co. v. P. R. Co.*, 230 U. S. 247, 258; *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 389.

Here, acting in its administrative capacity, the Commission found that petitioners' acts and practices in according Western Maryland service to the Coal Company mines, while failing and refusing to accord similar service to respondent's mine during the period involved, *and also the so-called 80-20 offer*, were unlawful. It also laid down the standard of service that should have prevailed, to wit, that petitioners should have honored respondent's orders for cars (which were *daily* orders) divided between the two in such divisions of 100 per cent of the *daily* rating of his mine as his judgment dictated, and should have furnished CARS to his mine in conformity with the supply available on their respective roads. But pursuant to the further hearing granted for the sole purpose of determining the amount of respondent's damages on the basis of this standard, the Commission proceeded to treat the single 80-20 offer made on some undisclosed date after the latter part of October 1922, the same as bona fide tenders of cars on each and every day from October 14, 1922 to April 1, 1923; and to treat respondent's refusal or neglect to respond affirmatively to this "offer" made on a single day, the same as a

refusal to accept and load cars actually placed for loading at his mine on each and every day throughout the period. Indeed, the Commission proceeded to treat as lawful the very "offer" which, in its administrative capacity, it had found unlawful because it was arbitrary and made without regard to the requirements of respondent's business.

Furthermore, exhibit B to the petition (the second report) shows on its face that the Commission's action in applying the mitigation-of-loss rule was contrary to the indisputable character of the evidence and, in fact, without the only kind of evidence that could possiby support it. The only conceivable evidence that could justify the application of the mitigation-of-loss rule in a case such as this would be evidence that the complainant shipper had refused to accept and load cars placed for loading at his mine. There was no such evidence in this case. The evidence was that respondent accepted and loaded all cars tendered to him. He accepted all real offers of transportation made to him. The Commission so found in its second report. Moreover, neither report discloses where the 80-20 offer originated, the date it was made, how it was presented, or the duration of the arrangement contemplated by it, although the first report indicates that the date was subsequent to the latter part of October, 1922 (R 16).

A finding made by the Commission without material and relevant evidence to support it, or contrary to the indisputable character of the evidence, is beyond its powers and void. So, also, any finding of the Commission is void if the facts found do not, as a matter of law, support it. *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 91-2; *Interstate Com. Com. v. Union P. R. Co.*, 222 U. S. 541, 547-8.

Even if the undisclosed and unknown is assumed and the 80-20 offer treated as one for the whole period, the Commission's action in respect thereof constituted a misapplication of the mitigation-of-loss rule. While a party suf-

fering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss, "the duty of the injured party is governed by the rules of common sense and fair dealing; he is not required to take such action as might under the circumstances be imprudent and impracticable". *Corpus Juris*, Vol. 17, pp. 767-770. "The amount of care required is not to be measured by *ex post facto* wisdom; he is not bound at his peril to know the best thing to do". *Sedgewick on Damages* (9th Ed.), Sec. 221. Respondent sold his coal on the open market. He did not know more than a day in advance where it was going. The Commission found that the 80-20 arrangement was arbitrary and made without regard to his business. While the Western Maryland car supply was better than the B. & O.'s at the time the 80-20 offer was made, *no one could possibly foresee what the respective supplies would be the following week or month.* A washout might tie up one road one week; some other calamity, the other road the following week. It so happened that the Western Maryland supply continued day by day to be better than the B. & O.'s,* and singularly remained so throughout the period, *but at the time the 80-20 "offer" was made*, no one could possibly know that such was going to be the case. In the circumstances, no prudent coal shipper, selling his coal on the spot market, would have submitted to the arbitrary conditions fixed by the railroad officials to fit the contract business of his chief competitor, and agreed to order his cars and ship his coal day after day, regardless of market or car supply conditions, on a fixed and unchangeable percentage basis, especially where, as here, the Western Maryland refused to prove its good faith by publishing rates from the shipper's mine with the result that in one instance of five cars received from that carrier, he had been compelled to assume $262.23 in over-charges (R 19). Respondent's rejection of

*It was on account of this "day by day" fact that respondent first placed his orders with the Western Maryland.

the empty offer was the act of a prudent man and entirely reasonable, while that which was demanded of him was unreasonable and unjust. A shipper is certainly not required to gamble with his business in order to save carriers from the consequences of their unlawful practices. *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.*, 159 Fed. (C. C. A. 1st.) 824, 830-1; *Northern Colorado In. Co. v. Pouppert*, 127 Pac. (Colo.) 125, 128; *McCleneghan v. Omaha & R. V. R. Co.*, 41 N. W. (Neb.) 350, 351; *Fewell v. Catawba Power Co.*, 86 S. E. (S. C.) 947, 950; *United States v. F. & G. Co.*, 236 U. S. 512, 526-7. In the first of these cases, the defendant induced a third party not to comply with a contract to furnish the plaintiff certain machines with the result that the plaintiff suffered damages. In the trial court, the defendant made a contention similar to that made by petitioners here, to wit, that if the plaintiff had used defendant's machines when offered to him, some or all of the damages claimed would have been avoided, and that as the plaintiff had not taken this means to reduce his loss, he was not entitled to recover the damages which resulted therefrom. The Circuit Court of Appeals for the First Circuit said—

> "This, properly interpreted and applied to the circumstances, is equivalent to maintaining that the defendant had a right to shut the plaintiff out from every other market, and to force it to purchase of itself. The law does not countenance a proposition so unreasonable and unjust."

In the *Thomas P. Sheldon*, 113 Fed. 779, 781, (also *Wabash R. R. Co. v. Campbell*, 117 Ill. App. 630, 634), it was said—

> "The rule of *Warren v. Stoddart* requires reasonable conduct on the part of one whose legal rights have been violated; but it should not be invoked by a defendant as a basis for a critical examination of the con-

duct of the injured party, or merely for the purpose of showing that the injured party might have taken steps which were wiser or more advantageous to defendant. Reasonably prudent action is required, not that action which the defendant, upon afterthought, may be able to show would have been more advantageous to him."

Next, the Commission's report (exhibit B) shows that respondent filed written orders for his rating of cars with both railroads. There was nothing to prevent them from complying with these orders on the 80-20 basis, unless it was the absence of Western Maryland rates from respondent's mine, a condition which that carrier alone was in a position to correct. If their 80-20 offer was *bona fide* and they thought it constituted the measure of their full duty in the premises, why didn't they perform that duty by placing cars on that basis at respondent's mine? Why didn't they complete the "offer" once or twice by making placements of cars on that basis? Their duty to place the cars was greater than, and antecedent to, his duty to accept and load them. He could do nothing to reduce his losses unless and until cars were actually placed for loading at his mine. Where he whose duty it is primarily to fulfill a contract and to prevent damages which may result from a failure has equal opportunity to fulfill the obligation, he alone may be depended upon to perform the duty, and it will not avail him to say that the injured party might have performed the duty for him and thus lessened the damages. *Corpus Juris*, Vol. 17, p. 774; *Louisville, New Albany & Chicago Rwy. Co. v. Sumner*, 106 Ind. 55, 58.

Next, it is contended that the plaintiff in an action for damages is under no obligation to accept a method of reducing his loss which might be construed as an abandonment of his claim, or be likely to work an estoppel against him. *Campfield v. Sauer*, 189 Fed. 576, 579; *Everett v. Em-*

mons Coal Mining Co., 289 Fed. (C. C. A. 4) 686, 691. Suppose respondent had accepted the letter or verbal 80-20 offer and Western Maryland rates had some time later been published from his mine, and he had then ordered and secured his cars on the basis said to be contemplated by the offer, what would petitioners have claimed when he sued them for damages? They would have claimed that he had secured all the cars he was entitled to on the basis of his orders, that he had waived his right to any additional cars, and that he was estopped from claiming damages. And if he had appealed to the Commission for relief, that body would have dismissed his complaint on the ground that no violation of the Act had been shown. See *Reeves Coal Co. v. Chicago, M. & St. P. Ry. Co.*, 37 I. C. C. 707, 708.

Next, it is contended that respondent did all that the mitigation-of-loss rule required of him. He filed daily orders for 100 per cent of his mine rating with the Western Maryland (as the Commission held he had a right to do) and when that road refused to honor the requisitions, he placed his orders with the Baltimore & Ohio, *and further that he accepted and loaded all CARS actually tendered to him by both railroads.* And, at their request, he loaded the cars received as heavily as possible. What more could a reasonably prudent man have done?

Lastly, it is contended that petitioners' persistent refusal to accord respondent's mine a two-road status and to permit him to divide his orders for cars and ship his coal via either or both roads as desired, while contemporaneously according these rights and privileges to the similarly-located and competing Coal Company mines, was not accidental, unforeseen or mere negligence on petitioners' part, but a continuous tort and violation of statutory duty. In such circumstances, the courts have held that the mitigation-of-loss rule does not apply. *Kendall v. Chicago, etc. R. Co.*, 95 S. W. 757, 759; *Galveston, etc. R. Co. v. Zart-*

zinger, 92 Tex. 365, 44 L. R. A. 556; *American Smelting & R. Co. v. Riverside Dairy & S. Farm,* 236 Fed. (C. C. A. 8) 510, 514-15; *Wilson v. Scarboro,* 88 S. E. 872, 873; *Borden v. Carolina Power Co.,* 93 S. E. 442, 443; *Heaney v. Heeney,* 2 Denio (N. Y.) 625, 627; *Cardwell v. Norfolk, etc. R. Co.,* 88 S. E. 495, 496; *St. Louis, Southwestern R. Co. v. Lee,* 151 S. W. 331; *Corpus Juris,* Vol. 17, pp. 777-8.

This Court has held that the rights of a shipper under the Act cannot be varied by the contract or tort of the carrier. *Keogh v. Chicago & N. W. R. Co.,* 260 U. S. 156, 163. See also *Williar v. Canadian N. Q. Ry. Co.,* 17 I. C. C. 304, 305; *Mississippi River & B. T. Ry. Co. v. Director General,* 55 I. C. C. 674, 678-9; *Clark Davis Coal Co. v. Director General,* 53 I. C. C. 357, 360; *Coakley v. Director General,* 59 I. C. C. 141, 144-5.

For the foregoing reasons and those stated by the Court below, it is contended that the Commission's action was erroneous as a matter of law. By multiplying the additional tonnage which the Commission found respondent would have produced if he had accepted the 80-20 offer by the profit per ton and totaling the results, a grand total of $34,310.67 is secured. If this amount with interest is added to the amount of the reparation order with interest, a total of approximately $70,905.00 is secured, or more than sufficient to cover the judgment.

(b) As for the average loading finding and deduction, the Commission's enumeration of petitioners' contentions at the hearing on damages shows that they made no attack whatsoever upon respondent's average loading of 53.55 tons per 50-ton car, or upon the use of such loading in determining the lost tonnage (R 26). His computations in this respect were not questioned. Furthermore, the petition shows that petitioners requested him to load his cars as heavily as possible, that he complied with their requests to the extent stated, and that no issue in respect thereof

was raised in the complaint to the Commission or the petition in court. It must therefore be presumed that petitioners in making the requests, and respondent in complying with them, acted within any applicable rule on the subject. The Commission made no finding to the contrary. Its finding was that 50 tons was used in the rules for determining the daily *rating* of a mine expressed in cars and in those governing the *distribution* of cars to coal mines. It made no finding that any rules provided that after the cars were distributed, 50 tons per car was the maximum *loading* permitted therein.

The Commission's own findings do not, as a matter of law, support the average loading deduction. It was therefore void. *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 91.

5. Petitioners' contention that verdict and judgment were unattainable without inclusion of the greater part of the damages avoidable "by acceptance of the offered car supply" and without inclusion of most of the amount disallowed by the Commission is baseless and untenable. The implication in the contention that respondent rejected an "offered CAR SUPPLY" is without foundation in fact. Both the petition proper and the Commission's report attached as exhibit B show that he accepted and loaded all the cars he received from both railroads.

Petitioners point to delimited portions of the opinion in *Pennsylvania R. Co. v. Jacoby*, 242 U. S. 89, 99 and (second appeal) *Pennsylvania R. Co. v. Weber*, 257 U. S. 85, 86, 91. There, the plaintiff sued for and finally recovered judgment for the amount of a reparation order which the Commission had arrived at on a basis "manifestly not intended by the Act of Congress". The first judgment for the apparently-excessive award was reversed and the case remanded, the plaintiff having relied exclusively upon the Commission's report. The second judgment *for the same*

amount was affirmed, notwithstanding the "inescapable conclusion" of this Court that the Commission had used a wrong basis in arriving at the amount of its award. But the second judgment was supported by other evidence than the Commission's report, which evidence this Court examined and found adequate. The other evidence consisted of "testimony tending to show" a basis of recovery sufficient to cover the judgment.

The record in the instant case contains no bill of exceptions. It must be assumed here that the trial proceeded as the statute requires, that the evidence presented was sufficient to support the verdict, and that the trial judge was justified in using the verdict as the basis for the judgment. There is no room for an "inescapable conclusion" to the contrary, especially as verdict and judgment were for over $22,000.00 less than the amount sued for and also for over $22,000.00 less than the Commission's computation of respondent's damages plus interest.

III.

Respondent's right of action and the District Court's jurisdiction were not limited in maximum amount to the Commission's award. This is a Section 16 (2) suit for damages resulting from violations of the Interstate Commerce Act, filed pursuant to a reparation order of the Commission not complied with by the carriers. The fundamental principles of equality and uniformity underlying the whole statute, as well as the plain language of section 16 (2) itself, compel the conclusion that in such suit the plaintiff has the right to recover, and the District Court the jurisdiction to give judgment for, the full amount of damages sustained, even though such amount is greater than the Commission's award.

1. A claim for damages under the Act is "a claim not for a penalty but for compensation (and) is a property right". *Spiller v. Atchison, T. & S. F. R. Co.*, 252 U. S. 117, 135. The measure of permissible recovery is the "full amount of damages" sustained by the person injured. *Section 8.* This measure embraces any and all damages, "whatever their nature", and "whatever the amount", traceable to the particular violation complained of. *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 203, 206; *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291.

2. While the Act fixes a single standard or measure of recovery, it provides two alternative methods or means of recovery. These are, complaint to the Commission or suit in a Federal District Court of competent jurisdiction, subject to the limitation that the person or persons claiming to be damaged "shall not have the right to pursue both of said remedies", but "must in each case elect which one of the two methods of procedure herein provided for he or they will adopt". *Section 9.* If the damages result from violations which require the administrative ruling of the Commission to determine them, these two "methods of procedure" are exclusive; they are the only means of recovery available to the injured shipper. *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 128; *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 471.

To "pursue" is to adopt measures to obtain. By giving the injured shipper the right to pursue only one of two federal remedies, compelling him to elect which one he will adopt, Congress clearly intended that each of the two was to comprehend whatever measures are necessary to secure recovery of the statutory standard of full compensation. It is also clear that each remedy was to be as adequate and complete as the other; indeed, that each was to be the equal of the other in final results. This is so because the funda-

mental principles of equality (the "primary purpose of the Act", *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 181) and uniformity (the "paramount purpose of the Commerce Act", *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 290) permeate Section 9 no less than the other provisions of the statute. Pursuant to this view, this Court has held that whether complaint is filed with the Commission or suit is brought in court, the same period of limitation applies (*A. J. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, 667); the cause of action accrues at the same time (*United States ex rel Louisville C. Co. v. Interstate Com. Com.*, 246 U. S. 638, 644); the same starting basis, a finding by the Commission on the administrative question, is required (*Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 436-7, 441-2, 446); and the same rules of law prevail, "the rule of damages in one hardly can be different from that proper for the other" (*Louisville & N. R. Co. v. Ohio Valley Tie Co., supra*, p. 291).

But to make certain that both methods of procedure will be controlled by the same rules of law and hence culminate in like final results, they must be construed as subject also to the same judicial machinery for correcting errors and mistakes. If one of two injured shippers, having secured the Commission's affirmative finding on the administrative question, seeks recovery of damages in a District Court, errors committed by that trial tribunal in determining the amount of damages may be corrected by appeal and new trial. If the other shipper seeks recovery by the alternative method of procedure, i. e., by carrying on before the Commission, similar errors committed by that body in determining the amount of damages may also be corrected by the courts. And, as in the new trial of the first shipper's case, the amount of the reversed judgment is not the maximum limit of recovery, so in that of the second shipper's

case, the amount of the Commission's award is not. In both new trials, the statutory standard of full compensation, whether more or less than the first judgment or award, remains the measure of permissible recovery. These conclusions follow for the same reasons of equality, uniformity and consistency with the underlying purpose of the Act so repeatedly stressed by this Court in passing upon other features of the two remedies. The identical reasons held by this Court to require the preliminary administrative ruling of the Commission to initiate the Section 9 method of procedure in a District Court in certain cases, call for the corrective aid of the courts to perfect and complete the Section 9 method of procedure before the Commission. "In other words, the Act cannot be held to destroy itself". *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 446. It cannot be assumed that Congress, having erected a guide post directing shippers to use either of two federal-aid highways to reach a common goal, intended to leave one of them without a bridge over the river of errors and mistakes.

3. The necessary bridge is provided in Section 16 (2). It was under this section that the present suit was instituted. So far as material here, it reads as follows—

> "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit (now District) Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the Circuit Court of the United States

> shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceeding unless they accrue upon his appeal," etc.

The foregoing suit is an adjunct of the "method of procedure" before the Commission referred to in Section 9, and part and parcel of that particular "remedy". It is a trial *de novo* of the action with the same corrective function, scope and power as the new trial in the alternative method of procedure in a District Court.

The language describing "such suit" is clear and plain. It is not of doubtful meaning or susceptible upon its face of two constructions. "Such suit *shall* proceed in *all* respects *like other civil suits for damages*" with two, and only two, exceptions, neither of which limits recovery to the Commission's award. When an exception is incorporated in a statute, it excludes all others than the one expressed, and the courts are not at liberty to ingraft other exceptions. *Expressio unus est exclusio alterius. Kendall v. United States,* 107 U. S. 123; *Ford v. United States,* 273 U. S. 593, 611. Moreover, one of the two exceptions makes the Commission's order merely *prima facie* evidence of the facts stated therein, a circumstance constituting conclusive proof that the amount awarded thereby was not intended to be the absolute maximum recoverable in the suit.

In this connection, it is significant that the Section 16 which became part of the statute March 2, 1889, and continued in effect until the enactment of the Hepburn Act June 29, 1906, the source of the present Section 16 (2), provided that the petition was merely to allege "such violation or disobedience (of the order or requirement) as the

case may be". 25 Stat. L. 860-1.* It contained no provision that the petition was to set forth the "causes for which he (complainant) claims *damages*", or that the "suit shall proceed in all respects *like other civil suits for damages*", or any other provision of similar import. The word "damages" did not appear in the whole section. These facts clearly indicate that by the new Section 16 (2), Congress intended to increase the rights of the shipper; whereas under the old section, his suit was on the award to recover the amount of same, under the new it is a plenary suit for damages not limited in maximum amount to the award.

The Hepburn Act also enlarged the venue provisions of such suits, and this Court referred to the significance thereof as follows in *Vicksburg, Shreveport & Pac. R. Co. v. Anderson-Tully Co.*, 256 U. S. 408, 413—

> "* * * the two principal amendments to the Interstate Commerce Act of 1887 show that it has been the plainly expressed policy of Congress to make the prosecution of suits upon reparation orders for the payment of money progressively easier and less expensive for the shipper."

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*The material part of the section was as follows—

If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this Act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time such order is made, and it shall be the duty of the marshall of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial of such suit the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if neither party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshall forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon.

That under the present section such "suit" is not on the award as such was specifically held by this Court in *Lewis-Simas-Jones Co. v. Southern P. Co.*, 283 U. S. 654, 661. It is a suit for damages actually incurred by the plaintiff. The Commission's findings and order are available as evidence. If they were regularly and properly promulgated (and it is so presumed until the contrary appears), they are conclusive so far as they determine the administrative questions, if any, in the case, but only *prima facie* correct so far as they determine the fact and amount of damages. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 257-8. To the extent that his cause of action involves administrative questions, the plaintiff is restricted to the Commission's order as proof; he must produce and rely upon it exclusively. But to the extent that it merely involves the fact and amount of his damages, he is not so restricted; he may, if he so desires, produce and rely upon other and additional evidence.

So far as the order is administrative, the plaintiff may not attack it, as such attack would be nothing less than an attempt to have the court substitute its judgment for that of the Commission upon a question committed by law to the exclusive jurisdiction of the Commission, and to evade Section 9 of the Act. If administrative, his cause of action must be within the scope of, and covered by, the Commission's order "*in the premises*", the Commission's affirmative declaration that the defendant violated the Act in the particulars complained of. To the extent that his cause of action lies outside the Commission's affirmative administrative declaration, he cannot maintain the suit. But so far as the order is quasi-judicial, so far as it merely determines the fact and amount of damages, the plaintiff, no less than the defendant, may attack it. He may overcome it with other evidence. He may show that the Commission erred in its mathematical calculations, in the formula used

in arriving at the amount of the award, and in the application of rules of law. This is made clear by the following definition of the *prima facie* clause promulgated by this Court in *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430—

> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacles to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents."

If, after securing the Commission's finding on the administrative question, if any, in the case, the plaintiff shipper elects to proceed in a District Court for damages, and that Court appoints an auditor to conduct a preliminary hearing for the purpose of classifying and compiling the various items making up the claim and of reaching a conclusion as to the amount due, the amount so found is not the maximum limit of permissible recovery. In *Matter of Walter Peterson*, 253 U. S. 300, 311, this Court said—

> "The (auditor's) report will, unless rejected by the court, be admitted at the jury trial as evidence of facts and findings embodied therein; but it will be treated, at most, as *prima facie* evidence thereof. The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor, or by the use to which his report may be put."

Therefore, in the Section 16 (2) phase of the alternative method of procedure, which "suit shall proceed in all respects like other civil suits", the Commission's report and order, insofar as they are quasi-judicial and determine the

fact and amount of damages, constitute nothing more or less than an auditor's report and have no greater force and effect than an auditor's report. The order (and report made part thereof) is merely a piece of evidence, and only *prima facie* evidence, to be weighed and considered along with the other evidence in the case. The amount stated in the order is in no sense the maximum limit of permissible recovery. It is not binding upon either party to the case. And, having been arrived at in a proceeding over which the District Court had no control, it is not binding upon the court and does not delimit its jurisdiction. In this connection, this Court further observed in *Matter of Walter Peterson, supra*, pp. 311-12—

> "The reasons for holding an auditor's report admissible as evidence are, in one respect, stronger than for giving such effect to the report of an independent tribunal like the Interstate Commerce Commission. The auditor is an officer of the court which appoints him. The proceedings before him are subject to its supervision, and the report may be used only if, and so far as, acceptable to the court."

4. But what about the limitation in Section 9 that "such person or persons shall not have the right to pursue both said remedies and must in each case elect which one of the two methods of procedure he or they will adopt"? The plain answer is that the Section 16 (2) right of *further* procedure in a *Federal or State* court is not the Section 9 right of *initial* procedure in a *Federal* court. The Section 16 (2) suit *per se* is not either of the Section 9 methods of procedure; it is merely supplemental to one of them and that on the method initiated by complainant to the Commission. After the complainant shipper has secured the Commission's finding on any administrative question involved in his case, and has exercised his right of election between the

two methods of procedure for recovering damages, he is committed to the one selected and must pursue the remedy provided by it. He will not be permitted to change over to the other method, not only because the statute prohibits it, but also because the fundamental principles of equality and uniformity underlying the whole statute give assurance that each method is the equal of the other insofar as final results are concerned. *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 472; *Standard Oil Co. v. United States*, 283 U. S. 236, 241.

So, also, if satisfaction of a reparation order is offered to and accepted by the complainant shipper, he may not subsequently resort to a State or Federal Court for general damages arising out of the same transactions but not, as alleged, included in the Commission's award. When the reparation order is complied with and payment accepted, as when the judgment order of a court is satisfied and payment acknowledged, no further proceeding, initial, corrective or otherwise, in regard to the transactions covered by it may be maintained in any tribunal. All damages attributable to the particular violation of the Act are compensated when payment of the Commission's award in the premises is accepted. *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291.

But if the reparation order is not complied with, due either to the refusal of the carrier to make the payment (or that of the shipper to accept it*), the Section 16 (2) suit is available for a judicial review and correction of the Com-

*While the question raised by this contingency is not present in this case, the language of Section 16 (2) is broad enough to permit the suit where non-compliance with the order is due to the shipper's refusal to accept the payment. This is particularly true if the first clause of the section is construed liberally as this Court held in the *Spiller Case*, 252 U. S. p. 315, all reparation provisions of the Act should be construed. In the suit so instituted, the shipper runs the risk of recovering less than the Commission's award, and the carrier can be protected by being relieved of interest on the amount thereof from and after the date of its offer of payment.

mission's mistakes, if any, and a final judgment commensurate with the statutory standard of full compensation, whether more or less than the Commission's award. This is so because if the same or a competing shipper had elected to pursue the alternative method of procedure, and there had been like dissatisfaction with the judgment of the District Court on the part of either defendant carrier or plaintiff shipper, the right of appeal and new trial would have been available for a review and correction of the trial court's errors and an eventual judgment according to the same standard. And in the trial *de novo* of the first case, no less than in that of the second, the amount of the initial award or judgment does not delimit either the plaintiff's rights or the court's jurisdiction.

5. While this Court has never directly and specifically decided the precise question here involved, it has sustained in one case a greater recovery than the Commission's award correctly computed, and has clearly intimated in other cases that the shipper's right of action and the District Court's jurisdiction are not limited in maximum amount to the Commission's award.

In *Pennsylvania R. Co. v. W. F. Jacoby Co.*, 242 U. S. 89, 99, and (second appeal) *Pennsylvania R. Co. v. Weber*, 257 U. S. 85, 90-1, previously referred to herein, this Court affirmed a judgment for the amount of a reparation order, the amount sued for, notwithstanding the "inescapable conclusion" that the Commission had used a wrong basis in calculating the amount thereof; *the award would have been automatically smaller if the correct formula had been applied to the basic figures from which the award was computed.* 242 U. S. pp. 94-7. Among other things, it was said (257 U. S. pp. 90-1)—

> "Under the circumstances here shown, when the case is fairly and fully submitted, as it was in the charge

> **of the judge to the jury, giving a correct basis upon which there might be a recovery of damages, and there is testimony tending to show damages in at least the sum awarded by the Commission, there is no prejudicial error because of the erroneous calculation of the Commission which was the basis of its award."**

In giving a correct basis upon which there might be a recovery of damages, the trial court rectified the Commission's mistake. In affirming the judgment, this Court necessarily upheld the trial court's jurisdiction to correct the Commission's errors and to permit recovery of the statutory measure of damages regardless of the Commission's calculation of the amount. The judgment was based, not upon the Commission's award, but upon other evidence tending to show damages in at least that amount, the amount sued for. It was sustained, not because it was for no more than the Commission's award plus interest, but because it was for no more than the statutory standard of recovery, the full amount of the plaintiff's loss. This is a clear case where both the amount sued for and the recovery permitted were greater than the Commission's award correctly computed, and this Court's affirmance of the judgment for the greater amount is therefore a persuasive precedent for the decision of the court below in this case.*

In *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 472-3, the plaintiff went into a state court while its claim was still pending before the Commission and secured judgment for $41,181.00 trebled, or a total of $124,443.00. Shortly thereafter, the Commission promulgated its report and, out of a claim for $36,401.12, awarded only $31,127.96. See 23 I. C. C. p. 191. This report was brought to the attention of this court (p. 463), and the quite large discrepancy between the claim, judgment and award should be borne in mind in considering the following significant excerpt from the opinion—

*See also *Pennsylvania R. Co. v. Minds*, 250 U. S. 368, 371-5.

"The federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, *that statute* determined the *extent* of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court, and there to secure treble damages under the state statute with respect to the same transactions.

"*This is not to say that the finding of the Commission as to the amount of the damages has any other effect than that prescribed in Section 16 of the Act.* It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practiced, was then entitled to proceed for the recovery of damages in accordance with the Act, and not otherwise."

Observe that the Court, having noticed that the Commission's award was less than the claim and also less than the state Court's judgment if not trebled, held that the Federal statute, not the Commission's award, determined the extent of the damages the plaintiff was entitled to recover, particularly as the finding of the Commission as to the *amount* of damages has no other effect than that prescribed in Section 16 (2), to wit, the effect of *prima facie* evidence only.

In *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291, the plaintiff secured an order from the Commission for $6,198.00 as reparation for unreasonable rates, and then instituted suit and secured judgment in a state court for over $50,000.00 for general damages arising out of the same transactions but not, as alleged, included in the Commission's award. Payment of the order having been offered to and accepted by the plaintiff, this Court held that all damages attributable to the overcharges (unreasonable rates) "must be taken to have been considered in the award of the Commission and compensated when that

award was paid", and reversed the judgment. But the true significance of the opinion so far as the instant case is concerned lies in the fact that this Court, after pointing out that Section 16 (2) provides that if the carrier does not comply with a reparation order in due time the complainant may sue in a state court, then indicated that the trial court would not be limited by the amount of the Commission's award. The Court said—

> "The decisions say that whatever the damages were, they could be recovered (*Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 202, 203; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 429); and that *the statute determines the extent of damages* (*Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 472)".

The citation of the *Clark Bros. Case* in support of the holding that the statute determines the extent of damages recoverable in a Section 16 (2) suit is particularly significant for there this Court followed a similar holding with the observation that the reparation order pursuant to which the suit is instituted has only the quality of *prima facie* evidence.

6. The view that the Commission's award is not the maximum amount of permissible recovery is not only compelled by the plain language of the statute and the principles of equality and uniformity in the light of which the statute must be construed, but is the necessary interpretation, as the Court below pointed out, if grave injustice is to be averted. By Section 9, Congress clearly intended to give the injured shipper the right of *voluntary* election between complaint to the Commission and suit in court as a means for recovering his damages. If his cause of action presents questions administrative in character, he cannot avail himself of this right until he has first secured the

Commission's administrative determination of the rule or standard upon which his recovery must depend. *Pennsylvania R. Co. v. Clark Bros. C. M. Co., supra,* p. 469; *Pennsylvania R. Co. v. Puritan Coal Min. Co.,* 237 U. S. 121, 131. If this administrative determination is delayed beyond the two-year period for bringing suit, he must recover his damages before the Commission or not at all. A construction of Section 16 (2) that in such cases the injured shipper is limited in maximum recovery to the Commission's award, even though the amount of the award was arrived at by an erroneous formula, the misapplication of rules of law, or incorrect mathematical computations, would be manifestly unjust. This Court has held that it is "bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute". *Knowlton v. Moore,* 178 U. S. 42, 77. The more reasonable interpretation of the court below is not only abundantly present in the plain language of Section 16 (2), but is entirely consistent with the underlying purpose of the statute.

Respondent was deprived of his right to a voluntary election of Section 9 remedies in this case. He was compelled to proceed for damages before the Commission or not at all. He proceeded before that body, secured a reparation order which petitioners elected to refuse to pay, filed his Section 16 (2) suit thereon, and recovered judgment for an amount which, although greater than the Commission's award, was less than that body's computation of his damages. The Court below said (R 96)—

> "It seems to us that to deny him the damages which he is in law entitled to recover because of the erroneous view of the Commission as to the law, is warranted neither by the language of the statute nor by any rule of law applicable in the premises."

7. In opposition to the views here urged, petitioners first contend that the "implication of the decisions" has been that a reparation order less in amount than the sum claimed is, as to the diminution, an unreviewable negative order. But the decisions cited, including that in *Standard Oil Co. v. United States,* 283 U. S. 235, 239, do not support the contention. They were with one exception (*Powers v. Cady,* 9 F.(2d) 458,* in which no Commission order was involved) in cases presenting questions administrative in character, and in which the Commission dismissed the complaints. The proceedings before the Commission never arrived at the stage where reparation was even considered. In baseball parlance, the complainants were all "thrown out at first base". The negative orders entered were not reparation orders in any sense of the term. They were negative pronouncements addressed primarily to the administrative questions involved. The claims for reparation fell automatically for lack of administrative bases to support them. For the courts to have reviewed such pronouncements would have been to substitute their judgment for that of the Commission in matters committed by law to the exclusive jurisdiction of the Commission. In the last analysis, the courts declined to intervene, not because the orders were negative, but because the subject matter of the controversies was administrative.

One of the decisions cited to support the "implication" referred to, that in *Alton R. Co. v. United States, supra,* was recently reversed by this Court (77 Law Ed. Advance Opinions 217) because the order, while negative in form, was found to be affirmative in effect. The italicised sentence in the following excerpt gives an indication of the questions pertaining to a Commission order which may be reviewed—

> "The determination of the questions presented is properly within the scope of judicial review of the

*Also *Brady v. United States,* discussed on pp. 54-5 hereof.

> Commission's orders. The questions are not the correctness of its conclusion as to the reasonableness of the divisions, or the correctness of its findings as to any of the factors which the Act directs it to consider in determining reasonableness. *The question is the correctness of the legal principles adopted by the Commission as a basis for reaching a conclusion from its findings.*"

In the recent case of *United States v. Interstate Commerce Commission*, No. 5816, decided January 30, 1933, the Court of Appeals of the District of Columbia granted a writ of mandamus to the Commission for reasons sufficiently indicated by the following excerpt from the opinion—

> "If we should hold that the commission may not be required to reach a conclusion consonant with its own findings, section 16 of the act would, we think, be meaningless. It would be to construe the language of the section—"If the commission shall determine that any party complainant is entitled to an award of damages"—to mean that the discretion of the commission—to "determine"—was not subject to challenge on any ground and that the commission's *ipse dixit* would control against the plain mandate of the act. We think this is not the law."
>
> In this case the commission has found, as we have pointed out, unlawfulness of rate, injury and damage, and the amount of loss. In these circumstances nothing more is necessary than the mere matter of the multiplication of the number of cars by the ascertained overpayment per car."

Likewise, in a Section 16 (2) suit, the determination of questions relating to the amount of damages is properly within the scope of judicial review. The soundness of the Commission's administrative finding and the appropriateness of its administrative standard may not be questioned, but "the correctness of the legal principles adopted by the Commission as a basis" for determining the amount of damages due under that standard may certainly be review-

ed by the trial court. In the instant case, respondent did not attack the Commission's administrative ruling or standard. He did not ask the District Court to substitute its judgment for that of the Commission regarding those administrative matters. On the contrary, he prayed the Court to give heed to and "enforce" them fully.

Petitioners also refer to *Standard Oil Co. v. United States, supra,* in support of the proposition that after an unsuccessful application to the Commission to recover damages, a plaintiff is barred by Section 9 from resorting to a court, and apply the doctrine thereof to the instant case by insisting that respondent, having secured an award of $12,838.31 plus interest from the Commission, is now barred from recovering more than that amount in court. But respondent's application to the Commission was not unsuccessful, and this suit was not instituted under Section 9. On the contrary, his complaint to the Commission under Section 9 resulted in a pronouncement that petitioners' acts and practices had been unlawful, a prescription of the standard that should have prevailed, and an award of damages in his favor, which petitioners elected to refuse to pay. He then brought this proceeding under Section 16 (2), which is nothing more than an adjunct of the method of procedure which he instituted initially before the Commission. It is not a new and independent suit under Section 9, as was that of the Standard Oil Co. That company had no affirmative administrative pronouncement, no administrative standard, no basis, no award, no "order", upon which to institute a Section 16 (2) suit. Accordingly, it attempted to have the court substitute its judgment for that of the Commission upon the administrative questions involved and to pursue what this Court regarded in substance and effect as another Section 9 remedy. It was held that it could do neither.

Some significance is attached to the fact that the *Standard Oil Co. Case* is cited in this Court's memorandum opin-

ion affirming the decree of dismissal in respondent's equity proceeding. The decision in the *Standard Oil Co. Case* was based upon three grounds. The first two dealt with the fact that as the Commission had dismissed the company's complaint involving matters essentially administrative in character, the order was negative in form and effect and the suit to annul it an attempt to have the court usurp the functions of the Commission. The third ground was that the suit was "nothing less than an attempt to avoid the statute by indirection", i. e., to start a second proceeding in respect of the same claims in direct contravention of Section 9 of the Act. The first two grounds were not applicable to respondent's equity proceeding. The third was applicable, peculiarly so, as respondent's action at law for the full amount of his loss was still pending in the District Court.

Petitioners also contend that if the power of judicial review is conferred on the multitude of state courts (as Section 16 (2) provides), there would be a possibility of varying and conflicting judgments as to the Commission's orders. But in *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 290, it was said—

> "If the parties properly preserve their rights, a construction given by any court, whether it be Federal or State, may ultimately be reviewed by this Court, either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured."

Lastly, petitioners contend that Section 16 (3f) of the Act indicates that the Commission's award is intended to be the maximum amount recoverable in a Section 16 (2) suit. Section 16 (3f) provides that a "*petition*" for the *enforcement* of an order of the Commission for the payment of money shall be filed in the District Court within one year from the date of the order and not after." It merely limits the time within which the "petition" referred to

may be filed. It does not limit the scope of that "petition" or the scope of the "suit" instituted by that "petition". For a definition of that "petition" and that "suit", resort must be had to Section 16 (2). There it is provided that the "petition" is to set forth the "causes for which he (complainant) claims *damages,* and the order of the Commission in the premises", and that the "suit *shall* proceed in *all* respects like other civil suits for *damages*" with only two exceptions, neither of which limits the amount of permissible recovery, and one of which limits the weight to be given the Commission's order to "*prima facie* evidence of the facts therein stated."

While the immediate purpose of Section 16 (3f) is to limit the time within which the Section 16 (2) suit may be instituted, its ultimate purpose and effect are to extend the Section 16 (3b) period of limitation in order to insure equality of treatment. Section 16 (3b) provides that "all complaints against carriers * * for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after * *." Although the two year period of limitation does not specifically apply to actions for damages instituted in courts of law, this Court has held that it must be so construed. *A. J. Phillips Co. v. Grand Trunk R. Co., supra.* Now if one of two injured shippers seeks recovery of damages in a District Court, he secures a *final* adjudication of his claim according to law and a judgment on which execution may issue, no matter how long it takes to secure the judgment. If the other shipper seeks recovery of damages by carrying on before the Commission, he secures a sort of *tentative* adjudication, and a piece of *prima facie* evidence on which execution may not issue. *Pittsburgh & W. V. R. Co. v. United States,* 6 F. (2d) 646, 648. If more than two years have elapsed since his cause of action accrued, it would be impossible for him, *but for*

Section 16 (3f), to secure what the other shipper has secured, to wit, a final adjudication of his claim according to law and a judgment on which execution may issue. The ultimate effect and purpose of that section, therefore, are to extend the Section 16 (3b) period of limitation for Section 16 (2) suits in order to insure equality of treatment to shippers who seek recovery of damages before the Commission.

Furthermore, as hereinbefore pointed out, the "order" for the "enforcement" of which the Section 16 (2) suit is instituted may have a dual characteristic; it may be partly administrative and partly quasi-judicial. So far as it is administrative, it is the same as a statute and conclusive on the court. So far as it is quasi-judicial and determines the fact and amount of damages, it is only *prima facie* correct. In a suit to *enforce* such an order, the administrative standard, not the amount of the award, is the measure of the plaintiff's rights and the trial court's authority. The court is to "enforce" the standard whether the result is a money judgment more or less than the Commission's award.

IV.

The questions whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's award are res judicata, having been determined by the decree in Brady v. Interstate Commerce Com., 43 Fed. (2) 847, affirmed Brady v. United States, 283 U. S. 804.

1. These questions were among those presented for determination in the equity proceeding above cited, which was instituted in the same District Court and at about the same time as was the instant action at law. The bill of

complaint attacked the deductions made by the Commission from the gross amount of respondent's damages. It was represented that unless they were set aside and annulled respondent would be subjected to irreparable injury for which he had no plain, adequate and complete remedy at law. The court was asked to set aside and annul them, direct the Commission to make a supplemental order consistent with the decree of the court, and to grant such further relief, etc. The respondents moved to dismiss for lack of jurisdiction. (R 8, 97-8; also 43 Fed. (2) pp. 848, 849).

The Court (Circuit Judges Parker and Northcott and District Judge Baker) decided the question or questions as follows (R 98; 43 Fed. (2) p. 852)—

> "If the party in whose favor it (reparation order) is made is not satisfied with it, he may in instituting his suit set forth the cause of action for which he claims damages, and the order of the Commission, and have his case proceeded with "in all respects like other civil suits for damages" except that on the trial the findings and order of the Commission shall be *prima facie* evidence of facts therein contained. There is nothing in the Act, we think, which limits his recovery to the amount awarded by the Commission and there is no reason why the recovery should be so limited. The order and findings of the Commission are *prima facie* evidence, just as is the report of an auditor in an action at law. *Ex parte Peterson*, 253 U. S. 300. *** It is apparent, therefore, that no irreparable injury is to be apprehended from reparation orders of the Commission, that any errors therein may be corrected in the trial provided for by statute, and that resort to injunction to set aside such orders is not permissible.
>
> "*For the reasons stated*, we think that the Court is without jurisdiction to entertain the suit, and the bill will accordingly be dismissed."

The plaintiff (respondent here) in the law action was the complainant in the equity proceeding. The two defendants (petitioners here) in the law action were respondents in the equity proceeding, *having voluntarily intervened,* submitted themselves to the jurisdiction of the Court, and participated by counsel in the hearing (43 Fed. (2) p. 848).

2. Every element necessary to, and justifying the application of, *res judicata* is present. There is an identity of parties. There is an identity of *questions* and *rights* involved, the contested *questions* and *rights* common to both proceedings being whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's reparation order. These *questions* and *rights* were actual issues in the equity proceeding. They were presented to a court of equity, so the initial *questions* and *rights* which that court had to determine were those inherent in the proposition whether the first prerequisite to its jurisdiction as a court of equity was disclosed by the bill. They had to be settled *in limine.* As said by this Court in *Singer Sewing Mach. Co. v. Benedict,* 229 U. S. 481, 484—

> "In courts of the United States it is a guiding rule of law that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares (citing statute), and the number of decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte,* and in other cases it is treated as waived if not presented by the defendant *in limine.*

See also *United States v. Bitter Root Development Co.,* 200 U. S. 451, 472.

Any and every court of equity has inherent power to prevent irreparable injury, and hence inherent power to

pass upon questions and rights involved therein. These questions and rights were settled by the special court; it dismissed the bill for lack of jurisdiction "for the reasons stated", one of which was that "no irreparable injury is to be apprehended from reparation orders of the Commission, that any errors therein may be corrected in the trial provided for by statute, and that resort to injunction to set aside such orders is not permissible". And petitioners, having participated in the litigation, are bound by the decision.

In *United States v. Moser,* 266 U. S. 240, 242, it was said—

> "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question,* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect to the thing adjudged, but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based." (Emphasis by the Court).

3. Petitioners say *res judicata* was never pleaded by respondent. Respondent was the complainant in the equity proceeding.* Furthermore, the two actions were carried on simultaneously in the same District court, the petition in the law action referred to the pendency of the equity proceeding, and the judgment in the first case finally determined was automatically decisive of the foregoing common questions and rights in the case left remaining.

Next they say the stated conclusions of the court in regard to the jurisdictional question now being discussed

*And the one-year statute of limitation had run when the special court's decision was announced.

were *obiter dicta.* They were not *obiter dicta.* The questions and rights involved therein were distinct issues in the case, were within the general powers of the courts to determine, and had to be determined; indeed, it was the court's duty to determine them *sua sponte in limine.* In any event, they were squarely raised and fully argued. And the court, "noticing the contention of plaintiff (respondent here) that he stood in danger of irreparable injury", actually and conclusively determined them. In *Florida C. R. Co. v. Schutte,* 103 U. S. 143, it was said—

> "As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the State bonds had been sold, the decision was in no sense dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion."

This Court gave no reasons for affirming the decree in the equity proceeding, but petitioners attempt to supply them by what they term the "proper interpretation" of the citations in the memorandum opinion. It is respectfully submitted that whether this Court travelled the same route all the way, or a different route part or all of the way, as the special court travelled, is immaterial. The important fact is that this Court reached the same goal as did the special court; it affirmed the decree of that court. In *Russell v. Russell,* 134 Fed. (C. C. A. 3rd) 840, 841, it was said—

> "A question expressly determined by a court of equity, whose decree is affirmed on appeal, is *res judicata* between the parties, although such question was not considered by the appellate court, whose affirmance was based on other grounds."

When it is remembered that an entirely erroneous adjudication of a *fact, question* or *right* in one proceeding may not be disputed in a subsequent action between the same parties *(United States v. Moser, supra)*, there is certainly a world of room for the proposition that the special court's determination of the foregoing questions and rights in the equity proceeding may not be disputed in the instant case. That determination is the "law of this case."

CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed.

GEORGE T. BELL,

Attorney for Respondent.

SAMUEL T. SPEARS,

Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 526.

THE BALTIMORE & OHIO RAILROAD COMPANY AND WESTERN MARYLAND RAILWAY COMPANY,
Petitioners,

v.

A. SPATES BRADY, *Respondent.*

PETITION FOR REHEARING

GEORGE T. BELL,

SAMUEL T. SPEARS,

Counsel for Respondent.

THE J. W. STOWELL PRINTING COMPANY, FREDERICKSBURG, MD.

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No. 526.

THE BALTIMORE & OHIO RAILROAD COMPANY AND WESTERN MARYLAND RAILWAY COMPANY,
Petitioners,

v.

A. SPATES BRADY, *Respondent.*

On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

PETITION FOR REHEARING

The respondent in the above entitled proceeding respectfully petitions the Court to grant a rehearing therein on the following grounds—

I.

The ultimate conclusion of the Court that respondent is "bound by the award" of the Commission is based upon subsidiary conclusions going back to and squarely resting upon inadequate statements of fact disclosing a misapprehension by the Court as to the real character of the primary question presented to the Commission.

1. The conclusion of the Court that respondent is "bound by the award" is predicated upon its conclusion that respondent, "having elected to seek relief through the Commission, is not entitled to recover more than the amount of the award." The conclusion that respondent "elected to seek relief through the Commission" is in turn based upon the conclusion of the Court that "there was no question in this case requiring the exercise of the Commission's administrative powers." And the conclusion that "there was no question in this case requiring the exercise of the Commission's administrative powers" is in turn based upon and goes back to statements of the Court that respondent—

> "*operated a coal mine on a branch of the Baltimore & Ohio railroad over which the Western Maryland had trackage rights. His mine was located between two mines operated by a competitor and served by both defendants*" —

and hence that his mine "was in the same class as the mines of its (his) competitor", and "entitled to have a supply of cars from either or both defendants as it (he) saw fit."

2. The italicised findings do not fully disclose the character and difficulty of the question presented to the Commission. Both the contract and the Western Maryland tariffs *specifically* named the competitor's mines, but not respondent's mine (R 2-3, 11-12). Respondent's mine was not on the main tracks of the branch, but on a short spur leading off the branch in the same town as one of the competitor's mines and connecting with the branch at a point between two of the competitor's mines (R 10-11). In a case decided prior to the period of the case (*Ridge Coal Mining Co. v. M. P. R. R. Co.*, 62 I. C. C. 259, 262), the Commission laid down the rule or principle that "if a carrier extends its service by a trackage agreement to one mine on another line, it would be difficult, if not impossible, to justify a re-

fusal to accord similar treatment to another *intermediate competing mine located on the track over which it operated under the trackage agreement*" (R 13). The Commission also had a rule pertaining to the application of rates from or to "intermediate" points not specifically named in tariffs (R 19, also 102 I. C. C. 19, 25). Respondent contended that his mine was "intermediate" to two of the competitor's mines within the meaning of the contract, tariffs and the Commission's rulings on the subject, and hence entitled to be regarded as "on" the Western Maryland (R 13). Petitioners contended to the contrary (R 14, 16, 19, also 102 I. C. C. 19, 25). The Commission held that respondent's mine was "intermediate" to the competitor's mines on the Coalton Branch and competitive with all of them, and that petitioner's acts and practices whereby they accorded Western Maryland service to the competitor's mines while failing to accord similar service to respondent's mine was unlawful (R 19, 11).

In the case so far stated, it is clear that a preliminary question which the Commission had to determine was whether respondent's mine was "on" the Western Maryland. The answer depended upon the solution of another preliminary question, to wit, whether respondent's mine was "intermediate" to any of the competitor's mines covered by the trackage contract and Western Maryland tariffs, all of which (both contract and tariffs) the statute required to be filed with the Commission. *Section* 6 (1-4) and 6 (5). The Commission noted that respondent's mine was on a spur "less than .05 mile" from the physical connection with the branch, a location which that body of experts "appointed by law and informed by experience" in such matters regarded as sufficiently close to the branch to be "on" it and hence "intermediate" to the competitor's mines at the end of the branch (R 11). The Commission's answer might

have been different if the distance from the mine to the physical connection had been 5 miles instead of .05 mile, or the spur on which the mine was located sufficiently long that it was not a "spur" but another "branch".

The foregoing preliminary question was not "a pure question of law" completely cognizable in a court. It was a question of law with administrative aspects, a mixed question of law and fact, and hence within the category of questions which called for "the exercise of the regulating function of the Commission". It was somewhat similar to that presented and decided in *Texas & P. R. Co. v. American Tie & T. Co.*, 234 U. S. 138, 146 as follows—

> "It is not disputable that the pivotal question in the case was whether oak railway cross-ties were included in the filed tariff fixing a through lumber rate of 24 cents per hundred weight, and so far as the solution of that inquiry depended upon the views of men engaged in the lumber and railroad business, as developed in the testimony, it is equally indisputable that there was an irreconcilable conflict. And this conflict at once leads to a consideration of the principle which dominates the controversy, and upon which its decision, therefore, depends.
>
> There is no room for controversy that the law required a tariff, and therefore, if there was no tariff on cross-ties, the making and filing of such tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute."

and to that presented and decided in *Standard Oil Co. v. United States*, 283 U. S. 235, 238-9, in this wise—

"The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law—but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use."

and to one described in *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 292, as follows—

"But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language,—a question of law,—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them, or that a particular usage existed."

The larger preliminary problem which the Commission necessarily had to solve was somewhat similar to one presented in *Adams v. Mills*, 286 U. S. 397, 409-10, where it was said—

"The defendants challenge the Commission's holding that the extra charge of 25 cents made to the shippers was an unlawful practice. The conclusion rests upon the findings that the Stock Yards are, in effect, terminals of the line-haul carriers; and that the service of unloading the livestock there is a part of transpor-

> tation. That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so. Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs.

and to one decided in *Interstate Com. Com. v. Atchison, T. & S. F. R. Co. (Los Angeles Switching Case)*, 234 U. S. 294, 311, as follows—

> "* * * it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service, which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.
>
> Such a question is manifestly one upon which it is the province of the Commission to pass.

A leading case involving a trackage contract somewhat similar to the one involved here was *York Mfrs. Asso. v. P. R. Co.*, 73 I. C. C. 40, 50, 51-2. There a majority of the Commission held that the practice of the Pennsylvania and Western Maryland in extending the use of their tracks to each other in a certain limited "zone" at York, Pa., and not in a neighboring zone was unduly preferential of shippers in the favored zone and unduly prejudicial to shippers outside that zone. A divided statutory court enjoined the Commission's order, holding that "the industries located along the tracks of either company in the zone are in law to be considered as on the individual tracks of both companies and the industries beyond this zone as located on the tracks of one of the companies only." *Pennsylvania R. Co. v. United States*, 295 Fed. 523, 527. This Court reversed the judgment of the statutory court, treated the question as administrative in character, and held—

"There is nothing in the Act to regulate Commerce, as originally enacted, or in Transportation Act, 1920, or in any earlier amendment, which indicates a purpose on the part of Congress either to allow a carrier to create undue prejudice by the use of facilities possessed, or to narrow the Commission's power to prevent unjust discrimination."

Subsequently, the Pennsylvania attempted to comply with the Commission's order by cancelling the arrangement within the zone, but was prevented from doing so by the Commission. 107 I. C. C. 219, 231, 241-4.

But even if it be assumed, as the Court assumed, that the preliminary question whether respondent's mine was "intermediate" to mines covered by the trackage contract and Western Maryland tariffs and therefore "on" the Western Maryland was "a pure question of law" requiring no administrative assistance of the Commission for its determination, the character of the problem presented to the Commission is not completely solved. The trackage contract and Western Maryland tariffs were initiated sometime prior to October 14, 1922, i.e., during a period of car *surplus*. The period from October 14, 1922 to April 1, 1923, the period of the case, was one of acute car *shortage*. During this period, respondent sold his coal entirely on the commercial market; the competitor had a large locomotive fuel contract with the Western Maryland which had to be filled partly with coal produced at its mines on the Coalton Branch (R 17, 12). Respondent's business was such that he did not know from one day to the next where his coal was going; the competitor's business was largely contracts divided about 80 per-cent on the Western Maryland and 20 per-cent on the B. & O. (R 17, 15-17).

In its last analysis, the question which the Commission was called upon to determine concerned the distribution of coal cars to mines located on a jointly-operated branch dur-

ing a period of car shortage, and was this: was the carriers' practice in according both Western Maryland and B. & O. car service to the competitors mines which had a Western Maryland fuel contract and divided their shipments between the two carriers according to definite percentages, while restricting respondent's mine to B. & O. car service because he had no Western Maryland fuel contract and declined to divide his shipments between the two carriers according to any definite percentages, unlawful? The carriers insisted that the classification and treatment accorded the competitor's mines was not that applicable to a "joint" mine under the car-distribution rules because the competitor divided its shipments according to definite percentages, whereas the rules permitted a "joint" mine operator to divide them as he saw fit. Respondent insisted that his mine was entitled to the classification and treatment of a "joint" mine and permitted to divide its orders and shipments between the two carriers as he saw fit. The Commission so held.

In the circumstances of the case, whether the carriers' "acts and practices" were such as to entitle respondent's mine to the full-fledged rating, classification and treatment of a "joint" mine during a period of acute car shortage was not "a pure question of law." It was essentially administrative in character. It was clearly one with administrative elements and hence within the limits of the Commission's exclusive initial jurisdiction.

The question thus presented has common elements with that presented and decided in *Midland Valley R. Co. v. Barkley*, 276 U. S. 481, 483. There the facts, contentions of the parties, and the conclusions of the Court were as follows—

> "Barkley and Burnett operated a wagon coal mine in Arkansas located about a quarter of a mile from

the line of the Midland Valley Railroad, a corporation of that state. They shipped their coal by that carrier, largely in interstate commerce. In the spring and summer of 1922 there was a widespread strike in bituminous coal mines throughout the United States. When mining was resumed in August, an acute car shortage developed. Coal is usually shipped in open top cars; and tipple mines, which are the largest producers of coal, can use only cars of that type. The supply of these being inadequate, the Midland, like other carriers, distributed the available open top cars among the tipple mines and its box cars among the wagon mines. Barkley and Burnett refused to accept box cars; and later brought, in an Arkansas court, this action against the Midland to recover damages for the alleged failure to furnish, during the period of the car shortage, an adequate supply of cars. By appropriate proceedings, the defendant objected to the maintainance of the action in the state court. It contended that the proper distribution of coal cars by interstate carriers in time of car shortage was an administrative question which Congress had committed to the Interstate Commerce Commission; and that the plaintiffs should have sought relief by application to that board. The trial court overruled the objection; the plaintiffs got a verdict; the judgment entered thereon was affirmed by the highest court of the state; * * and this court granted a writ of certiorari. * *. The only question for decision is whether the action lies.

The plaintiffs contend, and the state court held, that the action lay because it was brought to enforce the common-law duty of the carrier to furnish cars, * * —a duty confirmed by the statute of the state * * , and recognized by the Interstate Commerce Act. They argue * * that the plaintiffs made no attack, open or covert, upon any regulation or order of the Commission relating to the supply or distribution of cars * * that consequently no administrative question was involved * * .

> The assertion that no administrative question is here involved rests upon a misapprehension. It may be assumed that there was no order of the Commission which required the Midland to distribute all available open top cars among the tipple mines. But the reasonableness of the Midland's practice in doing so, and in allotting box cars to the wagon mines, was the substantial matter in controversy. The right of a shipper to cars is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demand which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers. * * In the case at bar, the right of the plaintiffs to recover depended upon whether the defendant's practice of distributing its open top cars to tipple mines and its box cars to wagon mines was reasonable. * * It was clearly one of those questions which, as recognized in the Puritan case, calls for "the exercise of the regulating function of the Commission". * *
>
> In the case at bar, the adequacy of the carrier's supply of open cars in normal times was not seriously questioned; there was no suggestion that the plaintiff's mine had been discriminated against; and the only substantial complaint was that the Midland's practice in allotting the open top cars to the tipple mines was illegal. * *
>
> We have no occasion to consider whether the then existing orders of the Commission required the Midland to adopt the practice followed. * *

In the sense that they all tendered the same commodity for transportation at points on the Midland Valley, the wagon mine and the tipple mines were in the same "class" and "on" the same railroad, their only distinguishing characteristic being in the means employed to load the coal into cars, a non-*transportation* difference. And the Midland Valley's practice of restricting wagon mines to box

cars and allotting to the tipple mines the more desirable open top cars was covered by no published rule of the railroad or regulation of the Commission. It is difficult to see how that *practice* presented any more elements of an administrative question than did the petitioners' *practice* of restricting respondent's mine to B. & O. cars and allotting both B. & O. and Western Maryland cars to the competitor's mines.

In *Director General v. Viscose,* 254 U. S. 498, 503-4, a shipper of silk secured an injunction restraining the Director General of Railroads from excluding silk from the list of commodities transported by railroads as freight. The complainant shipper of silk and the shippers of other commodities were in the same "class", in the sense that they were all entitled to transportation by railroad upon tender of goods for transportation by such an agency. The complainant shipper of silk therefore contended in this Court that "there was no administrative question" and that the "thing presents a question of law for the courts". But this Court (by a vote of 5 to 4) held that "exclusion in this case was an *attempted* classification * * within the exclusive initial jurisdiction of the Commission". It is impossible to see how that "*attempted* classification" presented an administrative question, if petitioners' actual classification (in practice and car service) of respondent's mine as a local B. & O. mine and the competitor's mines as "joint" B. & O. and Western Maryland mines presented no elements whatsoever of an administrative question. The railroads' refusal to furnish transportation to the shipper of silk and petitioner's refusal to furnish Western Maryland car service to respondent's mine are clearly in the same category. There is no logical basis for drawing a line between them, and treating the first as presenting an administrative question within the exclusive initial jurisdiction of the Com-

mission and the second as presenting "a pure question of law" within the concurrent jurisdiction of the Courts.

Moreover, in its per curiam opinion in the equity proceeding instituted by respondent, this Honorable Court clearly indicated that it then regarded the question involved here as administrative in character. *Brady v. United States*, 283 U. S. 804. In affirming the decree of the special court, this Court cited five cases. *Standard Oil Co. v. United States*, 283 U. S. 235; *United States v. L. & N. R. Co.*, 235 U. S. 314, 320 (note reference to p. 320); *Interstate Com. Com. v. D. L. & W. R. Co.*, 220 U. S. 235, 251 (note reference to p. 251); *Interstate Com. Com. v. Illinois C. R. Co.*, 215 U. S. 452, 470 (note reference to p. 470); *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 494 (note reference to p. 494). All five cases involved questions which this Court deemed administrative and committed to the exclusive initial jurisdiction of the Commission. *The Court's references to particular pages of the opinions cited in the last four cases are to parts of the opinions dealing exclusively and entirely with the principle that the administrative functions of the Commission are not reviewable by the courts, thus strongly indicating that this Court then deemed the question decided by the Commission in the instant case as one within the administrative category. It is difficult to account for the Court's reference to the particular pages unless it so regarded the question.*

3. If the question presented in the instant case is administrative, respondent was required to secure the Commission's determination of the standard upon which his recovery depended before he could assert any right to damages *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 469; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 131. He did secure the Commission's determination of that standard, but by the time the Commission announced its decision, it was too late to institute a Section 9 action

at law in the District Court (R 96). The Commission's determination of the administrative question was not made until May 10, 1926 (R 9), or more than two years after the cause of action accrued, consequently respondent was compelled to carry on before the Commission. Section 16 (3b) of the Act; *A. J. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, 667. Respondent did not make a voluntary election of remedies as contemplated by Section 9; he was deprived of this right by the delay of the Commission.

Viewed from the foregoing standpoint, the conclusions of the Court that respondent "*elected* to seek relief through the Commission" and *elected* "to call on the Commission for the determination of his damages" are inaccurate. He made no such election. He was compelled by the Commission's delay to proceed for damages before that body or not at all. A construction of Section 16 (2) that in such a case the injured shipper is "bound by the award" of the Commission would be palpably unjust. In *Knowlton v. Moore*, 178 U. S. 42, 77, this Court said that it is—

> "bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

Indeed, the Court holds in its opinion herein that—

> "The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him,"

thus indicating that if the "right of election" is denied to a claimant by the Commission's delay in deciding the administrative question, there would be no "adequate ground for making the Commission's award final as to him."

II.

The conclusion of the Court that the Section 16 (2) suit is "for the enforcement of the award" is inaccurate in a case where, as respondent contends was the case here, the award must be predicated upon an administrative standard previously determined by the Commission.

1. In support of its conclusion that the Section 16 (2) suit is for the "enforcement of the *award*", the Court cites Section 16 (3f) of the Act and *Lewis, etc. Co. v. Southern Pacific Co.*, 283 U. S. 654, 661.

Section 16 (3f) is that "a petition for the enforcement of an *order* for the payment of money shall be filed *** within one year from the date of the order, *and not after.*" In cases involving administrative questions, the *order* includes the administrative *finding* and *standard* as well as the *award*. It did in the instant case (R 29-30). The administrative finding and standard were *conclusive*, while the award was merely *prima facie* correct. *Mitchell Coal & C. Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 257-8. Respondent's suit was not for the enforcement of the *award*, but for the enforcement of the Commission's administrative *standard*.

Moreover, the fact that the section requires the petition to be filed "within one year from the date of the order, *and not after*" shows that it was intended merely to limit the time within which the petition referred to must be filed, and not the scope of the suit.

And in *Lewis, etc. Co. v. Southern Pacific Co., supra*, this Court, after stating that the Commission's determination of the administrative question is a "condition precedent to suit", observed that Section 16 (2) "contains nothing relating to evidence and procedure in state courts," and further that "*it is clear that the action is not on the award as such.*"

In cases requiring the Commission's determination of the administrative question, "it is clear that the action is not on the award as such," *but on and for the enforcement of the Commission's administrative standard, the only conclusive part of the order.*

The Court further observes that "plaintiff may not adopt the *award* as the basis of his suit and then attack it", citing *Mitchell Coal Co. v. Penna. R. Co.*, 230 U. S. 247, 258. Respondent did not adopt the *award* as the basis of his suit; he adopted the Commission's administrative *finding* and *standard* as the basis for his action. And the case cited, at the particular page referred to, holds that "the plaintiff cannot claim *under the Act* against it." Respondent here is claiming under the Act, i.e., under the finding and standard fixed by the Commission pursuant to the Act.

2. If the instant case is viewed as one involving an administrative question, the Court's conclusion that respondent is "bound by the award" of the Commission is counter to its holdings in *L. & N.R.R.Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 291, that "whatever the damages were, they could be recovered," and in *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*, 238 U. S. 456, 469, that "the finding of the Commission as to the amount of damages" has only the effect "prescribed in Section 16 of the Act," i.e., the effect of prima facie evidence. These two cases also involved administrative questions.

III.

If the foregoing contentions are found to be without merit, the Court is respectfully requested to amend its order herein so that the District Court may enter final judgment against the defendants for the amount of the Commission's award together with interest, costs and a reasonable attorney's fee, without the necessity of a new trial.

1. The first sentence of the second paragraph and the concluding sentences of the Court's opinion herein read as follows—

> "There is no bill of exceptions, and we are called on to decide whether the facts alleged in the complaint, of which the reports and order of the Commission are a part are sufficient to sustain the judgment.
>
> * * * * * * *
>
> "The allegations of the complaint comply with the requirements of Section 16 (2) and are clearly sufficient to sustain a judgment against the defendants for the amount of the award together with interest, costs and a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.
>
> The judgment of the Circuit Court of Appeals is reversed. The case is remanded to the District Court for proceedings in accordance with this opinion."

The judgment was for $63,048.60 with interest not including attorney's fee; the award was for $12,838.31 with interest.

2. In view of the nature of the case, the prima facie effect of the Commission's order and the action of petitioners in not filing a bill of exceptions, thereby waiving, in effect, all questions except the one of law as to whether respondent is entitled to recover more than the Commission's award together with interest, costs and a reasonable attorney's fee, it is respectfully submitted that this Court would be justified in carrying out the policy of the law to end litigation by remanding the case to the District Court with instructions to enter final judgment as above requested.

In *Adams v. Mills,* 286 U. S. 397, 406, 417, suit was brought in a District Court on a reparation order for $140,001.25 with interest. The case was tried before a jury upon

the evidence presented to the Commission and additional evidence introduced by the parties at the trial. At the close of the evidence, each of the two defendants moved on numerous grounds for a directed verdict. The District Court granted the motions on the ground that the plaintiffs had no such interest in the claims as entitled them to sue under Section 8 and 16 (2) of the Act. The Circuit Court of Appeals affirmed, but not being entirely satisfied with the reason assigned by the District Court, rested its decision on another ground. This Court granted certiorari, considered the propositions of law presented by the record, reversed the judgment of the Circuit Court of Appeals, *and remanded the case to the District Court with instructions to enter judgment for the amount of the reparation awarded together with interest and a reasonable attorney's fee to be fixed by it.*

The record of the case in this Court discloses that the respondents filed petitions for rehearing on the ground, among others, that if the judgment was to be reversed they were entitled to a new trial. The record of the case also shows that the pleadings presented material issues of fact, that the respondents in moving for a directed verdict expressly reserved the right to submit the case to the jury if the motions were overruled, and that the petitioners made no motion for a directed verdict. This court denied the petitions and declined to remand the case for a new trial.

There, the action of the respondents in moving for a directed verdict was tantamount to an admission on their part that in view of the nature of the proceeding and the effect of the Commission's order the case was one for the determination of the Court. Here, the action of petitioners in not filing a bill of exceptions had the effect of eliminating all questions of fact and of putting petitioners in a position

where they are estopped from objecting to the judgment to the extent that it is supported by the complaint including the reports and order of the Commission made parts thereof. This Court holds in the opinion on file that the complaint complies with the requirements of the statute and is "*clearly* sufficient to sustain a judgment against the defendants for the amount of the award together with interest, costs and a reasonable attorney's fee." It also holds that a Section 16 (2) suit is one to *enforce* the Commission's award. It would seem to follow that if the judgment herein had been for the amount found supported and sustained by the complaint, this Court would have affirmed it.

In the cited case, there was room for the exercise of the Court's discretion to end the litigation by authorizing the entry of final judgment, notwithstanding the Seventh Amendment, the provision of the statute that the Section 16 (2) "suit shall proceed in all respects like other civil suits for damages", and the decision in the *Meeker Case*, 236 U. S. 412, 430, that the prima facie character of a reparation order "does not abridge the right of trial by jury or take away any of its incidents". Likewise here, the state of the record is such that the Court would be justified in ending the case by authorizing the entry of final judgment for so much of the present one as is permitted by the statute. The cited case was 13 years old when the Court declined to remand it for a new trial; the instant case is now over 10 years old.

Wherefore, it is respectfully urged that this petition for rehearing be granted and that the judgment below be, upon further consideration, affirmed but if this request is denied, then it is urged that the order herein be amended so that the District Court may enter final judgment against the defendants for the amount of the Commission's award together

with interest, costs and a reasonable attorney's fee to be fixed by it.

Respectfully submitted,

GEORGE T. BELL,
SAMUEL T. SPEARS,
Counsel for Respondent.

CERTIFICATE OF COUNSEL

I, George T. Bell, one of the counsel for A. Spates Brady, respondent herein, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

GEORGE T. BELL.

SUPREME COURT OF THE UNITED STATES.

No. 526.—October Term, 1932.

The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, Petitioners,
vs.
A. Spates Brady.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[March 13, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

This is an action brought by respondent in the federal district court for northern West Virginia against petitioners in consequence of their failure to comply with a reparation order of the Interstate Commerce Commission. It directed them to pay to plaintiff $12,838.31 damages found to have been sustained by reason of undue prejudice to which they had subjected him in respect of furnishing cars for the transportation of coal from his mine. He sought judgment for $57,735.11 together with interest, costs and an attorney's fee. Defendants demurred to the complaint generally and also specifically upon the ground that plaintiff was not entitled to recover more than the award. The demurrers were overruled and, issue having been joined, there was a trial by jury which resulted in a verdict and judgment in favor of plaintiff for $63,048.60, not including attorney's fee as to which all questions were reserved. The Circuit Court of Appeals affirmed. 61 F. (2d) 242.

There is no bill of exceptions,[1] and we are called on to decide whether the facts alleged in the complaint, of which the reports and order of the Commission are a part, are sufficient to sustain the judgment. The substance of plaintiff's claim as thus shown is as follows.

[1]The district court found the proposed bill was presented out of time and refused to sign it. 56 F. (2d) 231. The Circuit Court of Appeals denied mandamus. 58 F. (2d) 627. This Court denied certiorari 287 U. S. —.

Between October 14, 1922, and April 1, 1923, he operated a coal mine on a branch of the Baltimore & Ohio railroad over which the Western Maryland had trackage rights. His mine was located between two mines operated by a competitor and served by both defendants. During that period there was a shortage of coal cars.

For the rating of, and the distribution of coal cars among, mines on their respective lines, each of the defendants established and maintained in force certain rules and regulations. These required that during periods of coal-car shortage the cars available for loading should be distributed pro rata among the mines in accordance with their ratings. They also permitted the operator of "any mine reached by two railroads to order 100 per cent or less of its rating from either of the said railroads, or to divide the orders between the two railroads in any way which the judgment of the operator dictated, provided the combined orders did not exceed 100 per cent of the rating of the mine; and the mine was entitled to receive its pro rata share of the available cars on the basis of such orders and to ship the coal loaded therein via the railroad which furnished the cars."

The Baltimore & Ohio furnished a smaller percentage of cars ordered than did the Western Maryland. Plaintiff's mine was being served exclusively by the former. Desiring to be served by the latter, he regularly ordered from it 100 per cent. of his rating but with a single exception was furnished no cars. He complained to the defendants and was informed that his competitor was ordering 20 per cent. from the Baltimore & Ohio and 80 per cent. from the Western Maryland and that such a division of his orders would be acceptable to them. He rejected the offer, claiming the right to order from either or both as from time to time he might see fit. But he was denied the right so given his competitor.

He complained to the Commission that defendants thus subjected him to undue prejudice. The Commission so found.[2] And it held the case open to permit him to file a petition for further hearing as to the amount of damages, if any, sustained by him.

[2] "The acts and practices of defendants whereby they accorded Maryland service to the mines of the West Virginia Coal & Coke Company located on the Coalton branch of the B. & O. Railroad Company during the period from October 14, 1922, to April 1, 1923, while failing to accord similar service to complainant's mine located intermediate thereto resulted in undue prejudice to complainant in the matter of car supply. 112 I. C. C. 251.

112 I. C. C. 244. And see 102 I. C. C. 19. Plaintiff upon such hearing claimed that the cost of mining the coal that he shipped had been increased $9,283.14 and that his loss of profits was $48,-451.97, making a total of $57,735.11. Defendants while denying liability did not controvert these figures. The Commission found that if plaintiff had accepted defendant's offer his increased mining costs would have been only $2,225.49 and his loss of profits but $10,612.82, making in all $12,838.31, and that he was entitled to reparation in that amount together with interest. It directed that, within 60 days, defendants pay that sum. 152 I. C. C. 327. They refused to do so.

The complaint attacks the award on the ground that as a matter of law the Commission erred in ruling that in order to lessen his loss plaintiff was bound to accept defendants' offer. It asserts that the reduction of his claim upon that ground was beyond the power of the Commission and therefore null and void.[3]

The Interstate Commerce Act declares it unlawful for a carrier to subject any person or traffic to any undue or unreasonable prejudice or disadvantage (§ 3) and imposes upon carriers liability for the full amount of damages sustained by any person in consequence of any such violation of the Act. § 8. A person so injured may either make complaint to the Commission or bring suit for damages in a district court; but he shall not have the right to pursue both remedies, and must elect which method he will adopt. § 9. If the Commission shall determine that complainant is entitled to an award of damages it shall make an order directing the carrier to pay to him the sum to which he is entitled on or before a day named. § 16 (1). If the carrier does not comply with such order, the complainant may file in the United States district court or in any state court a petition "setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated". § 16 (2).

[3]Plaintiff brought suit against the United States and the Commission to secure a decree directing the Commission to correct its findings in respect of damages. The district court dismissed the bill, 43 F. (2d) 847, and this Court affirmed. 283 U. S. 804.

Questions as to the reasonableness of rules and regulations governing the distribution of coal cars in periods of shortage are for the Commission. And until found unreasonable by it, a shipper may not maintain an action in any court against a carrier upon the claim that any such rule or regulation was unreasonable and that through its enforcement he sustained loss or damage. *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304, 313. But if the rule, regulation or practice of the carrier is not attacked and the shipper's claim is grounded upon its violation or discriminatory enforcement, there is no administrative question involved. In such cases the court is required merely to decide whether the carrier has departed from its established standard. The decision does not concern the reasonableness or validity of the rule itself and it has no tendency against uniformity or other purpose of the Act. Suits for damages upon such grounds may be prosecuted without action or finding by the Commission. *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121, 131-134. *Ill. Cent. R. R.* v. *Mulberry Coal Co.*, 238 U. S. 275, 282-283. *Penna. R. R.* v. *Sonman Coal Co.*, 242 U. S. 120, 124.

The facts stated in the complaint clearly show that there was no question in this case requiring the exercise of the Commission's adminstrative powers. Plaintiff's mine was in the same class as the mines of its competitor. It was entitled to have a supply of cars from either or both defendants as it saw fit. Cf. *United States* v. *New River Co.*, 265 U. S. 533, 542. His claim for damages does not rest upon defendants' adherence to or enforcement of their rule but upon their refusal to furnish him cars in accordance with the rule. Therefore, without any prior action on the part of the Commission, plaintiff was entitled under §§ 8 and 9 to maintain an action at law for the full amount of damages sustained by him on account of the undue prejudice to which he claims to have been subjected by defendants.

But having elected to seek relief through the Commission, plaintiff is not entitled to recover more than the amount of the award.

This is not a suit authorized by § 9 but one brought under § 16 (2) because of defendants' refusal to comply with the Commission's order. Subject to the right of contestation preserved by the Act (*Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412, 430) it is a suit for the enforcement of the award. § 16 (3) (f). *Lewis, etc. Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 661. Section 16 (2)

does not permit suit in the absence of an award, and if the Commission denies him relief, a claimant is remediless. *Standard Oil Co.* v. *United States,* 283 U. S. 235. *Brady* v. *United States,* 283 U. S. 804. *Bartlesville Zinc Co.* v. *Mellon,* 56 F. (2d) 154. No suit is permitted if the carrier pays the award. *L. & N. R. R. Co.* v. *Ohio Valley Tie Co.,* 242 U. S. 288. Cf. *Penna. R. R.* v. *Clark Coal Co.,* 238 U. S. 456. Plaintiff may not adopt the award as the basis of his suit and then attack it. Cf. *Mitchell Coal Co.* v. *Penna. R. R. Co.,* 230 U. S. 247, 258.

The fact that the Act merely makes the findings and report of the Commission *prima facie* evidence and so preserves the defendant's right to contest the award gives no support to plaintiff's contention that it does not bind him. It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that Congress saved their right to be heard in court upon the merits of claims asserted against them. The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him. Confessedly, it is final save when carriers refuse to pay within the time allowed. If by such a suit plaintiff may obtain a trial *de novo* or a revision of the award, the provisions of § 9 requiring election and prohibiting pursuit of both remedies would be set at naught in cases in which carriers refuse to pay and would be given effect in all other cases. There is no support for such a distinction. The construction for which plaintiff contends cannot be sustained. He is bound by the award.

Defendants insist that plaintiff not only was limited in recovery by the amount of the award but that he suffered no discrimination. The latter contention is without merit. The allegations of the complaint comply with the requirements of § 16 (2) and are clearly sufficient to sustain a judgment against the defendants for the amount of the award together with interest, costs and a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

The judgment of the Circuit Court of Appeals is reversed. The case is remanded to the district court for proceedings in accordance with this opinion.

It is so ordered.